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No. _____

# In the Supreme Court of the United States

Randall "Tex" Cobb,

*Petitioner*,

v.

Time, Inc.,

*Respondent*.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether an appellate court violates the Seventh Amendment's guarantee that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States" when, in conducting an "independent review," pursuant to the First Amendment, of a jury's finding of actual malice in a public figure libel case, it follows no articulated method for deferring to the jury's factual findings, including credibility determinations, and reverses the verdict based on its own redetermination of the facts.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed, are listed in the caption of the case.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Randall "Tex" Cobb respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on January 30, 2002 for which a petition for rehearing and suggestion for rehearing *en banc* was denied on April 4, 2002.

## OPINIONS BELOW

The January 30, 2002 Opinion and April 4, 2002 denial of a petition for rehearing and suggestion for rehearing *en banc* of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") are reported at 278 F.3d 629 (6th Cir. 2002) and reprinted at Pet. App. at 3a and 1a. The January 11, 2000 Opinion and Order of the United States District Court for the Middle District of Tennessee ("District Court") were not published and are reprinted at Pet. App. at 23a and 43a .

## STATEMENT OF JURISDICTION

The Sixth Circuit's decision was entered on January 30, 2002. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 4, 2002, and this Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## STATEMENT OF THE CASE

The Reexamination Clause of the Seventh Amendment commands that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This Petition asks this Court to address a Constitutional issue it has never specifically addressed: the extent to which the Reexamination Clause limits the power of federal appellate courts to set aside jury verdicts when exercising their duty of "independent review" imposed by the First Amendment in defamation cases.

Two core limiting principles have emerged from this Court's Reexamination Clause jurisprudence. The first concerns the *standard* of review, and the second, the *scope* of review. The standard of review must be highly deferential, such as the "clearly erroneous" standard. The scope of review is similarly constrained. "Historical" or "subsidiary" facts, including credibility determinations, are entrusted to the jury, and the application of the law to those facts is the province of the appellate court. In public plaintiff defamation cases, these Seventh Amendment principles are routinely violated. At best, there is widespread confusion, expressed by both circuit courts and commentators, on how to properly examine facts in a case where the jury made an actual malice determination.

After an eleven day defamation trial, a jury returned a $10.7 million verdict in favor of Petitioner Randall "Tex" Cobb ("Cobb") and against Respondent Time, Inc., the owner of

*Sports Illustrated* (collectively "SI").[1] As a public figure, Cobb proved to the jury by clear and convincing evidence that SI had published the defamation with actual malice, pursuant to *New York Times v. Sullivan*, 376 U.S 254 (1964). In response to an interrogatory, the jury made a specific, written finding of actual malice. This finding, in turn, could *only* have been made if the jury did *not* find credible SI's self-serving explanations of why it failed to pursue numerous leads that would have exposed faults in its story, and most importantly, its highly implausible explanation of why it never asked a single corroborative witness the one question that would have refuted the defamatory falsehood.

The District Court, having heard the evidence itself, conducted an independent review of the facts and denied SI's post-trial challenge to the actual malice finding. Pet. App. 28a - 30a. In the process, the District Court recognized that "credibility of witnesses was a central factor throughout the trial." Pet. App. at 41a.

On appeal, the Sixth Circuit, conducting its "independent review," reversed the judgment. Citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), the Sixth Circuit perfunctorily acknowledged the principle that "independent review" requires deference to the jury's credibility determinations, but, reflecting the endemic appellate court confusion on both the standard and scope of review, it demonstrated no actual deference. Pet. App. at 16a. Like most courts, the Sixth Circuit failed to observe any methodology for jury deference, including that suggested either by the majority opinion or by Justice Scalia's dissent in *Harte-Hanks*. Specifically, it made no effort to identify the pertinent undisputed facts or subsidiary facts. It made no attempt to identify either the facts the jury must have found or those it may have found in reaching its verdict. Consequently, it made no determination of which facts must be accepted as given, which

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[1] Jurisdiction was based on diversity.

facts must be reviewed under the clearly erroneous standard, and which were subject to "independent" review. Instead, it invaded the province of the jury and found facts contrary to SI's own admissions on cross examination.

Before the defamation, Cobb had been a successful character actor and professional heavyweight fighter. The defamation was published in an article entitled "The Fix Was In" in the *Sports Illustrated* issue dated October 4, 1993. The article focused on a boxing match between Cobb and Sonny Barch ("Barch"). The key defamatory statement was that Cobb knowingly participated in fixing the match, a match in which Barch admitted taking a dive.[2] The article conveyed the defamation not by a single statement but through a narrative in which Barch described Cobb knocking at Barch's hotel room the afternoon of the fight and sheepishly seeking guidance on how to choreograph the fix.[3]

Barch was the sole source for the defamation, and SI had serious reasons to doubt his veracity, including Barch's four convictions for check forgery, his lying to SI, and SI's paying him the $15,000 he demanded for the story. SI knew the defamation could destroy a person's career. Pet. App. at 41a. Nevertheless, SI never corroborated the defamatory statement. Pet. App. 25a-26a. Remarkably, no one from SI asked anyone the simple but absolutely critical question whether Cobb had participated in the fix. Pet. App. 13a.

Three aspects of the investigation have, in both SI's briefing and in the Sixth Circuit's opinion, masqueraded as

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[2] Whether the fight was fixed was not at issue at trial, on post-trial motions, or on appeal. The focus at trial was on the accusation that directly impacted and injured Cobb -- the accusation that *he* committed the crime (see e.g. 18 U.S.C. §224) of fight fixing.

[3] The jury's finding of falsity was not appealed, and thus the falsity of the defamatory statement was an undisputed fact. Also, the neutral reportage defense was not raised on appeal.

corroboration of Cobb's participation. They are: SI's corroboration of the more general, undisputed, completely immaterial fact that the fight was fixed;[4] corroboration from the Florida State Athletic Commission's Executive Director, Don Hazelton, of the same fact -- that the fight was fixed -- plus his testimony that Barch had earlier told him the same defamatory story he told SI; and finally, the SI journalists' supposed opinion, purportedly formed after they viewed the fight tape, that Cobb participated in the fix.

The reality, ignored by the Sixth Circuit, is that the jury rejected any and all testimony suggesting that corroboration that the fight was fixed provided any validation whatsoever for the defamation that Cobb participated in the fix. It also rejected any testimony suggesting that Hazelton had corroborated that Cobb participated in the fix. From the outset, the first conclusion is fallacious because the entire case is premised on a distinction between the assertion that the fight was fixed and the defamation that Cobb knowingly participated in fight fixing. But apart from that, SI admitted, through reporter Sonja Steptoe's testimony, that corroboration that the fight was fixed was not corroboration that Cobb also fixed the fight. Further, she admitted that Hazelton did not corroborate that Cobb fixed the fight.[5] In other words, when testifying

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[4] There are more than a dozen references in the Sixth Circuit opinion to corroboration that the fight was fixed.

[5] Steptoe was cross examined by Cobb's lawyer as follows:

> Q. Who corroborated that Sonny Barch and Tex Cobb had a conversation?
>
> A. Oh, no, I was saying no one corroborated.
>
> Q. No one corroborated, isn't that correct?

(continued...)

[5](...continued)
A. Yes.

* * *

Q. ... My question is, in your mind, if Sonny tells Don Hazelton Tex was in on the fix and then Don Hazelton tells you what Sonny said, is that corroboration in you mind?

A. No, it goes to Sonny's credibility.

Q. Goes to Sonny's credibility. It is not corroboration, is it?

A. No, it is not.

Q. So Don Hazelton never corroborated that Tex Cobb was in on the fix, isn't that correct?

A. That's right.

Later in the examination, Steptoe testified:

Q. Would you agree with me that a rumor is what somebody says they heard from somebody else.

A. Uh-huh.

Q. That's a rumor, isn't it?

A. Yeah.

Q. And the only rumors that -- the only thing you ever had on Tex Cobb were rumors. Rumors. Barch told Hazelton that Tex was in on it. Hazelton told you. That's a rumor, right? Isn't that a rumor according to the definition we just set down?

(continued...)

before the jury, SI itself had repudiated the theories that it advanced on appeal and that formed the foundation for the Sixth Circuit's "independent review." The Sixth Circuit totally ignored the cross examination testimony, which the jury believed, and indiscriminately made its own factual findings.

The jury also rejected any self-serving testimony by the journalists that their viewing the fight tape corroborated that Cobb participated in the fix. First, to contend such clear cut testimony exists is to distort the record.[6] Indeed, it would have been odd for the reporters to evaluate the tape to determine whether Cobb participated in the fix while simultaneously failing to ask any interviewee the same question; if it was not on their minds for one purpose, it would not have been on their minds for the other, unless they purposefully avoided asking the question for fear of the answer. But aside from that, the notion that they concluded from the tape that Cobb fixed the fight was squarely contradicted. For one, the jury viewed the fight tape for itself and found that Cobb did not participate in the fix. Also, Cobb's boxing expert testified, and the jury believed, that

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[5](...continued)
A. It is not corroboration.

[6] The Sixth Circuit needed to distort the record to reach its conclusions. One strategy for distorting the record was to lift discrete phrases from their context in the record and link them together in another context to imply something more. For example, the Sixth Circuit, quoting the record, wrote, "Hazelton concluded that the [fight] film *'bears out everything that was said'*" Pet. App. at 9a. Here, Hazelton's phrase, "everything that was said" never encompassed the idea of Cobb's participation in a fix. The phrase was part of Hazelton's testimony while watching the film, and the exclusive focus of all of his film testimony was *Barch* throwing the match. The Sixth Circuit uses other quotes similarly. Pet. App. at 9a. Its citations to pages in the record appearing after the phrases it extracted from the record represent anything but fidelity to the record. Pet. App. at 9a.

the tape indicated that Cobb did not participate in the fix. Further, two of the three journalists were cross-examined while the tape was playing and given the opportunity to identify what portions of the fight implicated Cobb in the fix. The jury simultaneously heard each journalists' testimony and observed each one's demeanor but rejected the notion that the journalists' admittedly non-expert view of the tape had corroborated Cobb's participation.

This is not a situation where corroboration was impossible. It was not, for example, a case of two co-conspirators whose agreement to conspire could be discovered from them alone. Even apart from interviewing the fight physician about Cobb's physical condition or Cobb's trainers about his prepration or boxing experts about the force of his blows, none of which SI did, SI could have traced Cobb's whereabouts during the afternoon of the fight to determine if the meeting in Barch's room had really occurred. Many avenues of investigation remained opened, not the least of which, of course, was the obvious one of asking the right people the right question.[7]

The jury, quite simply, did not believe SI.

## REASONS FOR GRANTING THE WRIT

### I. Overview: The Clash Between First And Seventh Amendment Jurisprudence Needs Urgent Resolution.

First Amendment principles emanating from *New York Times Co. v. Sullivan* impose on public official and public figure defamation plaintiffs the burden of proving by clear and convincing evidence that the defamatory statements at issue

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[7] As the jury heard through the testimony of Cobb's corner-man, Neely Owens, who was in Cobb's presence the entire day, Cobb never went to Barch's room the afternoon of the fight.

were published with actual malice, defined as knowledge of falsity or reckless disregard for the truth. Direct proof of actual malice, however, almost never exists in media defamation cases, for media defendants routinely testify that they did not publish with knowing or reckless disregard for the truth. As the Ninth Circuit wryly observed: "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1999). Thus, in most public plaintiff defamation suits, the case is won or lost at trial on the basis of circumstantial evidence of actual malice and related credibility determinations.

Further, trial battles over the existence or non-existence of actual malice routinely fall on the cusp between two substantive First Amendment defamation doctrines that are in constant and inevitable tension: (1) the precept that a failure to investigate a story fully is not, standing alone, sufficient to establish actual malice, and (2) the precept that a failure to investigate a story fully in circumstances that suggest purposeful avoidance of the truth establishes actual malice. Plaintiffs point to the media defendant's failure to fully investigate -- to records not examined, witnesses not interviewed, questions not asked, or biases of sources not discounted -- and cite these failures as circumstantial evidence of the media defendant's deliberately turning a blind eye to any material that might upset the working hypothesis of an investigation. Defendants naturally push in the opposite direction, dismissing investigatory failures as, at most, negligent oversights. In this context, credibility is everything.

In the aftermath of *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), lower courts were divided on how to reconcile the obligation of "independent review" with the traditional standard of deference paid to juries and judges sitting as triers of fact under the "reasonable jury" or "clearly

erroneous" standards. It was to address this conflict that this Court granted certiorari in *Harte-Hanks* on the question: "Whether, in a defamation action instituted by a candidate for public office, the First and Fourteenth Amendments obligate an appellate court to conduct an independent review of the entire factual basis for a jury's finding of actual malice -- a review that examines both the subsidiary facts underlying the jury's finding of actual malice and the jury's ultimate finding of actual malice itself." *Harte-Hanks* at 697. The Sixth Circuit in *Harte-Hanks* had openly acknowledged the conflict underlying this question, aligning itself against the view that appellate courts must make their own "independent" assessment of all the facts allegedly establishing actual malice, including predicate facts and credibility judgments, adopting instead the more modest appellate role of making the "independent" assessment of actual malice by *assuming* that all of the facts that the jury *could* have reasonably found *were* found in favor of the plaintiff.

In *Harte-Hanks*, however, this conflict was not resolved. Eschewing the analysis of both the Sixth Circuit and the most clearly conflicting circuit, the Court of Appeals for the District of Columbia, this Court's majority opinion chose to resolve *Harte-Hanks* on what it described as "a less speculative ground." *Harte-Hanks* at 690. The Court proceeded to examine the trial court's jury instructions, the jury's answers to three special interrogatories, and the undisputed facts, and from that examination, it distilled -- and how it did so remains uncertain -- what the jury "must" have found. Having so limited the scope of review, the Court held that "the conclusion that the newspaper acted with actual malice inexorably follows."

But if that conclusion inexorably followed in *Harte-Hanks*, it has not inexorably followed in the scores of public plaintiff libel appeals decided since. Nor has the methodology employed by the majority in *Harte-Hanks* proven "less speculative" to lower courts. Indeed, *Harte-Hanks* has exacerbated the confusion that previously existed, as lower

courts continue to struggle with the tension between independent review and deference. Some courts continue to adhere to a "reasonable jury" standard, deferring to jury judgments of actual malice by looking at the full record to determine if there are facts that a reasonable jury could have found that would have been sufficient to support the verdict. Most courts, however, roam unrestricted over the record, applying independent review indiscriminately, never attempting to separate subsidiary from ultimate facts, let alone attempting to separate facts a jury *must* have found from those it *could* have found or identifying the undisputed facts supporting the verdict. Cases falling into this pattern frequently offer perfunctory citations to *Bose* and *Harte-Hanks* on deference to jury credibility determinations but fail to elaborate on their method or standard of review, allowing for a *de facto* regime of full *de novo* review, with no meaningful deference to a jury's credibility determinations. The Sixth Circuit opinion in this case is an example of such an approach.

*Harte-Hanks* is now over twelve years old, and the experience under the regime it established is sufficiently matured to require re-consideration and clarification, particularly in relation to this Court's recent jurisprudence under the Seventh Amendment's Reexamination Clause. The uncertainty with which lower courts approach the task of reconciling independent review with appropriate deference to the role of juries serves neither the Free Speech Clause of the First Amendment nor the Reexamination Clause of the Seventh.

The stakes to society are high and of Constitutional dimension. In its modern defamation decisions, this Court has sought the appropriate balance between our nation's robust commitment to freedom of speech and the vital interests served by defamation law. Any standard of appellate review that fails to pay principled deference to at least the credibility findings of juries not only undercuts the interdiction of the Reexamination Clause but skews the balance this Court has attempted to strike under the First Amendment.

A rational reconciliation of these tensions is possible. Justice Scalia in his dissenting opinion in *Harte-Hanks* suggested one method -- he would have cleanly resolved the conflict that gave rise to the Court's granting of certiorari in favor of what was then the Sixth Circuit's approach, deferring to the jury on all subsidiary facts favorable to a plaintiff that could have been found. Three other members of the Court, Chief Justice Rehnquist and Justices Kennedy and White, indicated that they agreed with Justice Scalia on this point.

The Court should address this issue, critical to both the ongoing stability and proper balance of modern defamation law and to a basic respect for American jurors, whose willing participation in trials as fact finders lies at the foundation of our judicial system. Because the problem arises at the circuit level, only this Court can resolve it.

## II. The Seventh Amendment's Reexamination Clause Imposes Limits On Independent Appellate Review Of Juries' Actual Malice Findings.

Petitioner asks this Court to harmonize the Seventh and First Amendments by imposing a rule that commands federal appellate courts, when reviewing a jury's finding of actual malice, to constrain reexamination of predicate facts to review under a "clearly erroneous" standard. Petitioner further asks this Court to harmonize the Seventh and First Amendments by clarifying the scope-of-review methodology made blurry in *Harte-Hanks*, explaining whether appellate courts are to look only to those facts the jury *must* have found or those record facts the jury *may* have found in determining whether the actual malice standard is supportable.

The Seventh Amendment was adopted in response to one of the Anti-Federalists' principal objections to the proposed Constitution, its failure to ensure the right to trial by jury in civil actions in federal court. In particular, it was feared that

the right to trial by jury would be eviscerated on appeal. As Justice Joseph Story explained, the Reexamination Clause was specifically adopted to allay the "apprehensions" raised during the ratification period that the Constitution would permit "new trials by the appellate courts." *United States v. Wonson*, 28 F.Cas. 745, 750 (No. 16,750) (C. C. D. Mass. 1812). At common law, review of judgments was had only on writ of error, limited to questions of law. *Id* at 748; *see also* 3 William Blackstone, *Commentaries on the Laws of England* 405 (1768) ("The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it"). Justice Story, writing for the Court in *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732 (1830), thus held that no error could be assigned to a district court's refusal to allow a transcript of witness testimony "to serve as a statement of facts in case of appeal...." *Id.* at 443. This procedure was invalid under the Reeaxamination Clause because its object was "to present the evidence here [in the appellate court] in order to establish the error of the verdict in matters of fact." *Id.* at 445; *See also* Joseph Story, 3 *Commentaries on the Constitution of the United States* §§ 1757 - 1762 at 6209-32 (1833).

This Court's recent decisions reflect the continuing import of the Seventh Amendment generally and the Reexamination Clause in particular. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) recognized that the Reexamination Clause imposes restrictive limits on the degree of appellate review. In *Gasperini*, the Court addressed the extent to which the Seventh Amendment limited a federal appellate court's review of a district court's refusal to set aside a jury verdict. Two members of the Court, Justices Scalia and Thomas, took the position that the Seventh Amendment bars *any* appellate review of facts found by a jury and precludes appellate reversal of a trial judge's refusal to set aside a jury verdict under even a highly deferential "abuse of discretion" standard. Justice Scalia's dissenting opinion, joined by Justice Thomas, further attacked the rationalization that such review

was permissible because there comes a point on a spectrum of deference at which review is sufficiently deferential that it is transformed from review of "fact" to review of "law."

While the views of Justices Scalia and Thomas did not carry the day, they do provide an illuminating foil for what the Court *did* hold in *Gasperini*. That holding is best understood as this Court's considered judgment that the guaranty of the Reexamination Clause is to be preserved by the adoption of a highly *limited* standard of appellate review. *Id.* at 432-33.

The majority in *Gasperini* began with the premise that "[i]n keeping with the historic understanding, the Reexamination Clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,'" *quoting* Fed. R. Civ. P. 59(a). The Court then noted that "[i]n contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause." *Id.*, (*citing, Lincoln v. Power*, 151 U.S. 436, 437-438 (1894); *Williamson v. Osenton*, 220 F. 653, 655 (4th Cir. 1915); 6A Moore's Federal Practice ¶ 59.08[6], at 59-167 (collecting cases)). The Court in *Gasperini* held that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *Gasperini*, 518 U.S. at 435. Thus, appellate review did not violate the Seventh Amendment so long as the highly deferential "abuse of discretion" standard applied. *Id.*

While *Gasperini* recognized Seventh Amendment limitations on the *standard* of review, *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) recognized limitations on the *scope* of review. *Cooper* relied on a distinction between "predictive" or "historical" facts and the application of legal principles and policies to those facts. In *Cooper,* the Court held that the Seventh Amendment's

Reexamination Clause is not violated when federal appellate courts reverse a jury's award of punitive damages. The Court's holding in *Cooper* pivoted on the distinction between a jury's function in awarding actual damages as opposed to punitive damages. Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, this Court reasoned, the level of punitive damages is not really a "fact" that is "tried" by the jury, and therefore appellate review of a district court's determination that an award is consistent with due process does not implicate the Reexamination Clause. *Id.* at 437.

*Cooper's* distinction between findings of fact and the application of law to fact translates to defamation cases by bifurcating the actual malice determination into parallel categories, treating underlying "who, what, when, where, and why" questions, including credibility issues germane to them, as within the province of the jury, and "whether" questions, such as whether imposing liability under the assumed facts is consistent with the First Amendment, as questions appropriate for independent appellate review. When reviewing the first type of question, including credibility determinations, the Seventh Amendment as interpreted by *Gasperini* requires a highly deferential standard. Under such an approach, the Sixth Circuit could not have reached the factual conclusions that it did, which are contrary to SI's admissions on cross examination.

## III. The Current Clash Between Appellate Courts Over The Standard And Scope Of Independent Appellate Review Undermines Both The Seventh And First Amendments, Warranting This Court's Corrective Intervention.

*Harte-Hanks* has exacerbated more than relieved the tension between independent review and deference. Some

courts continue to adhere to a "reasonable jury" standard, deferring to jury judgments of actual malice by looking at the full record to determine if there are facts that a reasonable jury could have found sufficient to support the verdict. A decision from the Second Circuit, *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163 (2nd Cir. 2000), for example, affirmed a jury's actual malice determination by extensively examining the record and repeatedly holding that a reasonable jury *could* have found subsidiary facts supporting the actual malice finding, including the existence of ill-will, reliance on a source without direct knowledge, and the failure to further investigate the story. *See Id.* at 186. The *Celle* deferential "reasonable juror could conclude" standard drew a sharp dissent from Judge Jacobs, who argued that the majority had misinterpreted *Bose* and *Harte-Hanks*, describing the majority's analysis as "subversive." *Id.* at 192-93 (Jacobs, J., dissenting) ("The majority opinion holds only that the evidence is sufficient to convince a reasonable juror, but fails to recognize that evidence sufficient to convince a reasonable juror is here not enough to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice.... ...For that reason I fear that this is an important case and that the majority's error is a subversive one.")

The Supreme Court of Maine has similarly interpreted *Bose* and *Harte-Hanks*. *See Beal v. Bangor Publishing Co.*, 714 A.2d 805, 808 (Me. 1998) ("The jury could have rationally determined Richard's testimony to be credible. The jury could have also rationally rejected the rebuttal evidence.... With this credibility determination in mind, we conclude that clear and convincing evidence supports the determination that Sylvain's article contains defamatory statements made with knowledge of their falsity or with reckless disregard as to whether they were true or false.").[8]

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[8] The decision of the Maine Supreme Court is offered (continued...)

At least one court bravely attempts the calculation, seemingly mandated by *Harte-Hanks,* in which the appellate court subtracts from the universe of facts the jury *could* have believed those facts the jury *must* have believed, and on the basis of that distillation, determines if sufficient evidence exists to support the verdict. The Ninth Circuit recently summarized its understanding of its obligations under *Bose* and *Harte-Hanks* in *Planned Parenthood of the Columbia/Wilmette, Inc., v. American Coalition of Life Activists*, 2002 WL 992667 (9th Cir. 2002) (*en banc*), a non-defamation decision that drew heavily on that Court's prior independent appellate review jurisprudence as applied to actual malice libel decisions. The Ninth Circuit followed the view that the independent examination of the record contemplated by *Bose* is not equivalent to a *de novo* review of the ultimate judgment itself. It reads *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review, requiring "special deference" to credibility determinations but conducting a more searching review of other evidence germane to the actual malice determination. *Id.* at *8-9. The Ninth Circuit's defamation decisions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), and

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[8](...continued)
here, as are other state court decisions, to underscore the division among lower courts in their understanding of their First Amendment obligations under *Bose* and *Harte-Hanks*. Eliminating the state court's confusion in the application of First Amendment doctrine is an independently valid reason for this Court's grant of certiorari.

Although the state court decisions do not implicate the additional tension that exists within the federal system between the doctrine of independent appellate review and the Seventh Amendment because the states are not bound by the Seventh Amendment, nearly every state constitution includes a provision guaranteeing a jury in civil cases. Thus, a parallel tension remains relevant for state jurisprudence.

*Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) appear, at times at least, to *attempt* to distinguish between what a jury must have believed and may have believed. *See Eastwood,* 123 F.3d at 1252 ("we must figure out, as best we can from the cold record, which evidence the jury accepted as credible, and which it discarded. Then we must determine whether the *believed* evidence establishes actual malice.") But still the Ninth Circuit's actual application of the "must have" method is, like *Harte-Hanks* itself, rather opaque.

Finally, most courts engage in free-roving *de novo* review, merely acknowledging *Bose* and *Harte-Hanks* without employing any clearly articulated methodology to confine either the standard or scope of review.[9] Offering perfunctory citations to *Bose* and *Harte-Hanks* without elaborating on a method or standard of review, they have created a *de facto* regime of full *de novo* review with no meaningful deference to a jury's credibility choices at all. *See, e.g., Reuber v. Food Chemical News, Inc.*, 925 F. 2d. 703 (4th Cir. 1991) (court acknowledges principle of deference to credibility determinations but proceeds to rebut the district court's post-trial opinion without deferring.); *Campbell v. Citizens For An Honest Government, Inc.*, 255 F. 3d. 560 (8th Cir. 2001) (court acknowledges principle of deference in a single clause but reviews the record without method); *Levan v. Capital Cities/ABC, Inc.*, 190 F. 3d. 1230, 1239-1240 (11th Cir. 1999) (court acknowledges principle of deference, states that the law is unsettled as to the deference to be given to facts found by a jury, and then avoids the problem by redefining the gist of the defamatory statement so that most of the actual malice evidence

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[9] *See* Marc Sorini, Note, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 Georgetown L. J. 571-72 (1993) (*De novo* review, subscribed to by some courts, " ... represents a complete abandonment of Seventh Amendment values because it removes all restraints from appellate court review of jury decisionmaking.")

then becomes undisputed); *Lundell Manufacturing Company, Inc. v. American Broadcasting Companies*, 98 F.3d 351, 359 (8th Cir. 1996); *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741, 747-48 (8th Cir. 1991) (non libel case applying *Bose* and *Harte-Hanks*); *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 106 (1st Cir. 2000), (*citing Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997) ("Deference to the jury is muted ... when free speech is implicated."); *Duffy v. Sarault*, 892 F.2d 139, 145 (1st Cir. 1989)).

The recent opinion of the Supreme Court of Texas further illustrates the depth of uncertainty at the state court level. In *Turner v. KTRK Television, Inc.*, 38 S.W. 3d 103, 120 (Tex. 2000), the court seemed to want to have its review both ways, at once deferential and *de novo*. *Id.* ("Once we have resolved credibility questions in favor of the jury's verdict, however, we must independently evaluate 'the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.' [I]t is not enough for us, therefore, to determine that a reasonable jury *could have found* that Dolcefino acted with actual malice."). This ostensible doctrinal duplicity drew a sharp dissent from three Justices of the Texas Supreme Court, who faulted the majority for its independent review methodology. *Id.* at 135 (Baker, J., dissenting).

Other state supreme courts fail even to acknowledge the principle of deference. *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 464-465, 896 S. W. 2d. 897, 902 (1995) (reverses what jury must have believed.); *Fuller v. Russell*, 311 Ark. 108, 842 S.W. 2d. 12 (1992); *Woodcock v. Journal Publishing Co.*, 230 Conn. 525, 646 A. 2d. 92 (1994); *Welch v. American Publishing Co of Kentucky*, 3 S. W. 3d. 724 (Ky. 1999); *Davis v. Borsky*, 660 So. 2d. 17 (La. 1995); *Elder v. Gaffney Ledger*, 341 S. C. 108, 533 S.E. 2d. 899 (2000); *Peeler v. Spartan Radiocasting, Inc.* 324 S.C. 261, 478 S.E. 2d. 282

(1997). Still others acknowledge the principle of deference but make no attempt to apply it, except in a dissent. *Diesen v. Hesburg*, 455 N. W. 2d. 446 (Minn. 1990).

The Eleventh Circuit openly acknowledged "...confusion on how this [independent] review relates to factual findings made by the jury." *Levan* at 1239-40.

That such free-ranging independent review has become a vehicle for invading the province of the jury is evident from the near impossibility for a public plaintiff to sustain a jury verdict on appeal. Available statistics, as well as a casual review of cases, confirm this fact. From 1984 through 1994, an astonishing 67% of plaintiffs' verdicts reviewed on the actual malice issue were reversed on that issue.[10] The latest statistics, though not focusing on the actual malice issue alone, substantiate the general phenomenon. For instance, during the 1990s, appellate courts modified the plaintiffs' verdict in 63.2% of the cases for which they rendered decisions.[11] The figure was somewhat higher for the prior ten years, 71.7%.[12] By contrast, when a plaintiff appealed during the 1980 through 2001 period, 75.9% of the defense verdicts were affirmed.[13]

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[10] Libel Defense Research Center, *Ten Years of Appellate Review in Defamation Cases from* Bose *to* Connaughton *to the Present*, LDRC Bulletin No. 2 (Apr. 1994) at 27 (hereinafter "1994 LDRC Bulletin.")

[11] Libel Defense Research Center, *LDRC 2002 Report on Trials and Damages,* LDRC Bulletin No. 1 (Feb. 2002) at 51 (hereinafter "2002 LDRC Bulletin.")

[12] *Id.*

[13] *Id.* at 52. More than half of the defense verdicts were not appealed, while the vast majority of the plaintiffs' verdicts were appealed. *Id.* at 51-52. This disparity can be explained by the greater incentive for defendants to appeal, particularly where there

(continued...)

Media attorneys recognize that appellate courts use independent review to invade the province of the jury. Their comments on the subject at an open forum in 1994 remain a fair assessment of the status of post-*Harte-Hanks* independent review:

> Appellate courts, for the most part, first have a visceral reaction to the facts and, then, determine how much deference to give to the trier of fact. This notion is related to whether the plaintiff appears, on the face of the record, to have been "done wrong."[14]
>
> If the court becomes convinced that the speech in question is worthy of constitutional protection, the courts seem to have no difficulty working around *Connaughton's* tautologies.[15]
>
> Appellate judges are divine people. If they become convinced that the speech you are defending is worthy of constitutional protection, they will have no trouble in exercising their divine right and intruding into the province of the jury under the guise of independent review.[16]

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[13](...continued)
is an opportunity, enjoyed by defendants only, for undisciplined independent review.

[14] 1994 LDRC Bulletin at 26.

[15] *Id.* at 27.

[16] *Id.* at 26.

Without guidance from this Court, lower courts are forced to deal largely in euphemism, unable to settle on any disciplined method for reviewing actual malice verdicts.

## IV. The Decision Below Is Typical Of The Erosion Of The Seventh Amendment.

The Sixth Circuit's opinion is an example of the *de novo* approach violative of the Reexamination Clause. The Sixth Circuit's lone sentence explaining the standard of review illuminates the current problem:

> Credibility determinations made by the trier of fact are reviewed under a clearly erroneous standard, but the reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment protect." Pet. App. at 23a.

By dint of mere juxtaposition, the Sixth Circuit fused the proposition that credibility determinations are judged by the clearly erroneous test with the proposition that the reviewing court must itself examine the circumstances surrounding the act of defamation to determine if it merits First Amendment protection. Here, the Sixth Circuit omitted the critical middle step, the step in which the rubber meets the road in appellate defamation practice. That step, mandated by the Seventh Amendment, and undoubtedly intended by this Court under *Bose* and *Harte-Hanks*, demands that an appellate court first identify and segregate those jury findings to which the "clearly erroneous" standard applies. Without this transition step, one Constitutional principle inevitably swallows the other. There will either be deference to the jury verdict across the board, which will undermine the independent appellate review

required by the First Amendment, or there will be *de novo* review across the board, which will undermine the Seventh Amendment and the deference contemplated by *Bose* and *Harte-Hanks*. As the Sixth Circuit performed the task, it was the principle of independent review that swallowed that of deference. When such is the significance of the Seventh Amendment, *Bose* and *Harte-Hanks*, for defamation plaintiffs, there is nothing.

## V. A Disciplined Methodology For Independent Review Is Essential To Preserving The First And Seventh Amendments.

This Petition presents a Constitutional policy issue regarding whether the First Amendment is in any way compromised or adulterated by a standard of review that defers to jury verdicts on predicate factual questions such as credibility. The Petitioner strenuously argues that it is not, and that this Court's passing analysis of this question in *Bose* and its more detailed analysis in *Harte-Hanks* both assume that it is not. If, on reviewing a jury verdict, an appellate court is satisfied that the verdict can be explained by the jury's finding that alleged facts "A, B, and C" were true, and that the opposing factual claims "D, E, and F" were not true, and if those predicate factual findings are not clearly erroneous, then the First Amendment standard is faithfully vindicated by empowering the appellate court to review independently *only* the question of whether actual malice was proven, under *this* factual matrix, by clear and convincing evidence. While such a standard of review remains faithful to the First Amendment, it is also harmonious with, indeed mandated by, this Court's jurisprudence under the Seventh Amendment's Reexamination Clause.

Although both *Bose* and *Harte-Hanks* contemplated that appellate review of credibility assessments should be limited to the highly deferential "clearly erroneous" standard, reconciling the deference manifestly intended by *Harte-Hanks* with the

Court's confusing "must have found" methodology has proved intractable. The "must have" methodology poses problems from the start. First, it is extremely difficult for an appellate court to determine what facts a jury "must" have found. This can be vexing when special interrogatories are used, but it can be virtually impossible on review of a general verdict. *See* Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Courts*, 50 Duke L.J. 1427, 1442 (2001) ("in trying to reconcile *Bose* and Rule 52(a), the courts of appeals faced the dilemma that when, as in most cases, the jury's decision was a general verdict, there was no way for the appellate court to know exactly what the jury's credibility determinations were.") In the end, the "must have" scope of review is a far more, not less, speculative ground than the "may have" scope of review.

Second, there is no logical reason why the "must have" formulation is necessary. It is certainly not required to vindicate First Amendment rights. Because it puts the appellate court in the difficult position of picking and choosing among various facts in the record, it is inherently susceptible to abuse of the appellate function prohibited by the Reexamination Clause.

Justice Scalia's *Harte-Hanks* dissent was prescient:

> While I entirely agree with this central portion of the Court's analysis, I do not understand the Court's approach in conducting that analysis only on the basis of the three factual determinations the Court selects. To begin with, I am dubious of the Court's conclusion that the jury must have made all three of those findings in order to bring in the verdict that it did under the judge's instructions, and in order to answer as it did the only relevant "special interrogatory," which was "Do you unanimously

> find by clear and convincing proof that the publication in question was published with actual malice?" ... More important, however, even if each of these factual findings happened to be necessary to the verdict and interrogatory response, I see no reason to make them the exclusive focus of our analysis, instead of consulting (as the Sixth Circuit did, and as courts invariably do when reviewing jury verdicts) all the reasonably supported findings that the jury could have made. It may well be true that "we need only consider those factual findings that were essential to the jury verdict" in the sense that referring to those alone is enough to decide the case--*i.e.*, those alone establish clear and convincing proof of malice. But one could pick out any number of categories of permissible jury findings that would meet that test. For example, it might be true that we could find the requisite proof of malice by considering, not all the evidence in its light most favorable to the plaintiff, but only that evidence produced by a particular witness. We could then say "we need only consider the findings the jury might have made based on the testimony of Mr. Smith to decide this case." I see no more logic in limiting the inquiry the way the Court has done than in limiting it in this latter fashion.

*Harte-Hanks* at 699 (Scalia, J., dissenting).[17] Justice Kennedy,

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[17] Justice Scalia went on to pose a hypothetical to reinforce the point: "Assume a case in which there are innumerable controverted allegations, dozens of which, if the plaintiff's version is credited, would suffice to establish malice; but in which only one

(continued...)

Chief Justice Rehnquist, and Justice White all appeared to endorse Justice Scalia's reasoning in *Harte-Hanks*. *See Id.* at 696 (Kennedy, J., concurring) ("I join the opinion of the Court, for in my view it is not inconsistent with the analysis set out in Justice Scalia's separate concurrence."); *Id.* at 694 (White, J., joined by Rehnquist, C.J., concurring) ("In my view, in cases like this the historical facts--*e.g.*, who did what to whom and when--are reviewable only under the clearly-erroneous standard mandated by Federal Rule of Civil Procedure 52. Credibility determinations fall in this category, as does the issue of knowledge of falsity. But as I observed in dissent in *Bose* ... the reckless disregard component of the *New York Times Co. v. Sullivan* 'actual malice' standard is not a question of historical fact. A trial court's determination of that issue therefore is to be reviewed independently by the appellate court. As I read it, the Court's opinion is consistent with these views, and--as Justice Kennedy observes--is consistent with the views expressed by Justice Scalia in his concurrence. Based on these premises, I join the Court's opinion.").

## VI. The Status Quo Is The Worst Of All Worlds.

The enormous uncertainty of the status quo serves

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[17](...continued)
controverted allegation--the defendant's allegation that he knew firsthand the truth of the libelous charges--could not possibly have been found against the plaintiff if the jury was to come in with the verdict that it did. If we applied today's analysis to that situation, we would then proceed to ask whether the fact that the defendant did not know firsthand the truth of the charges, and that he lied about that, is alone enough to establish clear and convincing proof of malice. It clearly would not be. Surely, however, we would not reverse the judgment for the plaintiff, when dozens of other disputed contentions which the jury might have resolved in the plaintiff's favor would establish clear and convincing proof." *Id.*

neither plaintiffs nor defendants. It serves neither the interests in personal dignity and reputation protected by the law of libel nor the free speech interests guarded by the First Amendment. *See Harte-Hanks* 689 ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech -- the more elusive the standard, the less protection it affords."). *See also Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Newton* at 666 (defining the proper role of judge and jury is a "daunting" task); David Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 495 (1991) ("Whether the clearly erroneous standard also governs review of other subsidiary fact findings from which the jury infers actual malice has not been decided."); Susan Giles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L. J. 1735, 1753 n. 71 (1998) (observing that *Harte-Hanks* failed to clarify the conflict between deference and "independent review of the record in full."); Sheldon Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.Car. L. Rev. 273, 292 (1990) ("The 1989 'clarification' of the extent of the reach of *Bose* into jury findings in *Harte Hanks* ... has not shed a great deal of light.").

Naturally, capable plaintiffs counsel and capable media defense counsel will each attempt to exploit the existing confusion to their clients' advantage, with plaintiffs typically seeking to limit review as much as possible and defendants seeking to expand it into wholesale *de novo* review. Either way, the confusion is inherently de-stabilizing and corrosive. As Lee Levine, who argued *Harte-Hanks v. Connaughton* before this Court, stated in a candid retrospective of ten years of appellate review, "[t]he courts are as befuddled by independent review today as they were before *Connaughton* and indeed before *Bose*." 1994 LDRC Bulletin at 27.

The Sixth Circuit's jurisprudence on the matter has itself been a roller coaster ride. In its *Harte-Hanks* opinion, it aligned

itself in solid opposition to roaming review, sharply critiquing the contrary position that had emerged from an *en banc* decision in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987), stating that "it would appear that the [*Tavoulereas*] court in fact ignored this standard and instead elected to selectively re-examine the evidence to arrive at what the court *itself* thought would be a more reasonable interpretation of the facts." *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 840 n. 8 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989). Following this Court's decision in *Harte-Hanks*, the pendulum in the Sixth Circuit swung back precipitously in the opposite direction. *See Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992). This shift drew a strong dissent from Judge Batchelder, who applied the clearly erroneous standard to testimony the jury must have rejected. *Id.* at 1233. (Batchelder, J., dissenting). But by the time of the current decision in *Cobb*, the migration was complete.

Judge Robert Sack, in his influential treatise on defamation law (and against the backdrop of his distinguished earlier career as a media defense lawyer), summarized the current confusion well, observing that "*Bose* and *Connaughton*, both difficult cases, wrestle with the independent review problem but do not quite resolve it. The extent to and circumstances under which a reviewing court in a public figure or public-official defamation suit may or must bow to the credibility judgments, expertise, factual familiarity, or general role of trial courts and trial juries remain muddy." Robert Sack, *Sack on Defamation*, §16.5.5.3 (3d ed. 1999).

When, on a prior occasion, the careful balance struck under modern Constitutional and defamation principles became skewed, this Court intervened. See *Milkovich v. Loraine Journal Co.*, 497 U.S. 1 (1990). If this Court fails to grant review of the Sixth Circuit's judgment, perpetuating confusion and imbalance, the public will suffer. Not only is the present system unfair to public figure and public official plaintiffs, but it fails to serve the long-standing, powerful social interests

underlying defamation law. As the law of defamation evolves into a system in which "the press always wins" because decisions by juries are cavalierly disregarded, the public interest in the maintenance of a modest but still meaningful check on harmful errors in news reporting and public discussion is thwarted. As this Court recognized in *Milkovich,* "there is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Id.* at 22-23 *quoting Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Defamation law is admittedly a highly imperfect mechanism for restoring a good name ruined by an injurious falsehood. But it is the best system our society has developed over centuries, and this Court plays a vital role in keeping that system in reasonable repair, especially when the flaw lies at the appellate level. *See Milkovich*, 497 U.S. at 22-23 ("The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored. . . .We believe our decision in the present case holds the balance true.")

The current uncertainty is the worst of all worlds, failing to fulfill either the restraints on appellate review contemplated by the Framers under the Seventh Amendment or our commitment to robust and wide-open public discourse under the First Amendment. At the same time, it works to eviscerate the powerful public interest in a fair and stable system of defamation law, which this Court has described as reflecting "no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

## CONCLUSION

For the reasons set forth, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

**No. 00-5159**

**[Filed April 4, 2002]**

| | |
|---|---|
| RANDALL CRAIG COBB, ALSO KNOWN AS RANDALL TEX COBB, | ) |
| Plaintiff-Appellee, | ) |
| v. | ) |
| TIME, INC., DOING BUSINESS AS SPORTS ILLUSTRATED, | ) |
| Defendant-Appellant. | ) |

**JUDGES:**
BEFORE KENNEDY, MOORE, and COLE, Circuit Judges.

**ORDER**

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

**No. 00-5159**

**[Filed January 30, 2002]**

| | |
|---|---|
| RANDALL CRAIG COBB, a/k/a RANDALL "TEX" COBB, | ) |
| Plaintiff-Appellee, | ) |
| v. | ) |
| TIME, INC., d/b/a SPORTS ILLUSTRATED, | ) |
| Defendant-Appellant. | ) |

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 94-00836
Robert L. Echols, Chief District Judge

**JUDGES:**
Before KENNEDY, MOORE, and COLE, Circuit Judges.

## OPINION

KENNEDY, Circuit Judge. Plaintiff Randall "Tex" Cobb, a former professional boxer and character actor, sued defendant Time, Inc. d/b/a *Sports Illustrated* ("*SI*") for libel. The action arose out of an article that appeared in the October 4, 1993 edition of the publication *Sports Illustrated*, a prominent national sports magazine. The article, entitled "The Fix Was In," dealt with a number of professional boxing matches involving boxing promoter Rick "Elvis" Parker in which the outcomes were allegedly prearranged. The primary example was a match involving Cobb and a boxer named Paul "Sonny" Barch which took place on September 15, 1992. The article published Barch's account of the events surrounding the match, including claims that Barch and Cobb had agreed that Barch would "take a dive" in the first round, that Cobb had discussed with Barch how this would play out in the ring, and that Parker, Cobb, and Barch had used cocaine together the night before the match and again shortly after the match. After trial, the jury returned a verdict in favor of Cobb for $8.5 million in compensatory damages and $2.2 million in punitive damages. Defendant filed a Renewed Motion for Judgment as a Matter of Law or in the Alternative for a New Trial or Remittitur, which was denied by the district court. Defendant appeals. For the reasons set forth below, we reverse the judgment of the district court and remand for entry of judgment in favor of defendant.

### I. Procedural History

In 1993, *Sports Illustrated* published an article implicating Cobb as a participant in a "fixed" (or "arranged") boxing match. The article also suggested that Cobb had used cocaine with his opponent, Sonny Barch, and the promoter,

Rick Parker. The article was based largely on statements given by Barch to *SI* reporters. Cobb sued *SI* for libel. *SI* filed a motion for summary judgment, which was granted in part and denied in part. The court ruled that *SI* could not be held liable for certain statements contained in the article because there was no evidence of "actual malice," as required in a public figure libel case, with respect to those statements. First, the court held that *SI* could not be liable for the statement that the fight had been fixed, because *SI* possessed evidence, other than Barch's account, that corroborated that statement. Next, the court determined that Cobb's claim must fail as to a statement in the article that Cobb had told Barch prior to the fight that he had a shoulder injury because that statement was substantially true. Cobb had argued to the district court that he did not, in fact, have such an injury, but rather had a rib injury. The court, in granting summary judgment as to this statement, noted: "The point is that [Cobb] entered a boxing match knowing that he had an injury which would likely impair his ability to box." (J.A. at 407.) Finally, the court granted summary judgment as to an implication in the article that Cobb had tested positive for cocaine after the fight. Cobb conceded that he was suspended for testing positive for marijuana use, but denied that he ever tested positive for cocaine use. The wording of the article, however, made it seem as though Cobb's positive test was for cocaine use. Nonetheless, the court concluded that the implication was substantially true, because the "sting" of the statement was "that a professional boxer ingested an illegal drug prior to fighting and that such drug would likely affect his ability to box." (J.A. at 408.)

The court denied summary judgment, however, as to two statements in the article. First, that Cobb had knowingly

participated in the fixed fight (since Barch could have agreed to "take a dive" without Cobb's knowledge or participation in the scheme). Second, that Cobb had used cocaine with Barch *after* the fight. The jury was permitted to consider Cobb's libel claim insofar as it was based on these two statements, and returned a verdict in Cobb's favor. The trial court then denied *SI's* renewed motion for judgment as a matter of law or for a new trial or for remittitur and entered judgment in favor of Cobb. *SI* appeals.

## II. Factual Background

Because this court is required to independently review the evidence of "actual malice," discussed below, a detailed review of the *SI* investigation is necessary. In September, 1993, *SI* senior editor Steve Robinson received an unsolicited telephone call from a relatively unknown boxer named Sonny Barch. Barch told Robinson that he had participated in a fixed fight promoted by Parker in Fort Lauderdale, Florida in 1992. Barch told Robinson that he had given sworn testimony to Don Hazelton, the Executive Director of the Florida State Athletic Commission ("FSAC"), regarding this fight, as well as another fixed fight that Barch had been involved with as a manager. Barch asked Robinson if he could be paid for giving *SI* his story. Robinson told Barch that *SI* would not pay for information, but that it would pay for a first-person account of events, if Barch's story checked out. Robinson and Barch agreed that *SI* would pay Barch $1000 to hold the story from other publications for ten days so that *SI* could investigate. Robinson promised Barch an additional $14,000 at the end of the ten day period if the story checked out.

This story was not "hot news." Nothing about it required immediate dissemination. However, the *SI* reporters planned to investigate the story within the 10 day deadline and "close" on the story in time to publish it in the October 4 issue. Robinson's first step was to call Don Hazelton, the Executive Director of the FSAC. There is no dispute about Hazelton's credentials. He had been the director of the FSAC for nearly five years, had attended the Cobb-Barch match and every other boxing match in Florida during his tenure, had conducted an investigation of the match in question, and had previously served as the president of the National Association of Boxing Commissions and the North American Boxing Union, as well as the Executive Director of the International Boxing Organization. Hazelton told Robinson that Barch had indeed given sworn testimony to the FSAC about the Cobb-Barch match and the "improprieties as far as that fight was concerned." (J.A. at 1546.) Hazelton also told Robinson that it was his opinion that the fight had been fixed. Robinson then spoke with Marty Dardis, an *SI* investigator who knew Hazelton and confirmed that he was a reliable source.

Robinson's next step was to assign Sonja Steptoe to investigate the story. Steptoe had over eight years of reporting experience for the *Wall Street Journal* and *SI*, but was not a boxing expert. Steptoe conducted a lengthy interview of Hazelton in person. Hazelton told Steptoe that Parker was a promoter with a reputation for corrupt practices. Hazelton then told Steptoe about the fight in question. Hazelton said that the fight was originally scheduled to feature Cobb versus a boxer named Tim Anderson. When Hazelton arrived at the weigh-in, however, Parker sought to substitute Barch for Anderson. Parker told Hazelton that he preferred Barch because "he couldn't trust Anderson." (J.A. at 1523.)

Hazelton also stated that Parker had complained that Anderson was refusing to fight unless he got paid more than $2500. Hazelton, however, said that he spoke to Anderson, who told Hazelton that he was willing to fight for $2500 or less.

Hazelton also told Steptoe that he saw Cobb arrive at the venue very late -- only twenty minutes before the fights were to begin. Cobb claims that this was due to the transportation arrangements made by the promoter. (J.A. at 1160-61.) Hazelton also told Steptoe that Barch appeared "bone dry" when he stepped into the ring -- a sign that he had not warmed up before the fight. (J.A. at 1528.) Hazelton also found it odd that Barch did not have anyone working in his corner. Hazelton and Steptoe then watched the fight film, and Hazelton told Steptoe that Barch's performance was one of the worst he had seen. He told her that he thought Tex's performance "lacked enthusiasm" and "wasn't quite what [he] had thought it should be after making a comeback and a television shot this early." (J.A. at 1530.) Hazelton then told Steptoe that he had spoken with the ringside officials about the fight, and they were of the opinion that the fight had been arranged. Immediately after the fight, Hazelton had Cobb and Barch submit to a surprise drug test. Barch tested positive for cocaine, while Cobb tested positive for marijuana. Hazelton imposed an indefinite suspension on both boxers as a result of the positive drug tests. Hazelton also suspended Barch for either being in a pitiful physical condition for the fight or for not giving maximum effort. Cobb was not similarly suspended for his performance.

Barch then contacted Hazelton in the summer of 1993. According to Hazelton, Barch told him that Parker had

convinced Barch to "take a dive" in the Cobb fight, that Cobb and Barch had discussed how this would happen in Barch's hotel room before the fight, and that Barch and Cobb had used cocaine together after the fight in Parker's hotel room. Hazelton told Steptoe about this conversation, and indicated that Barch had repeated these allegations in a sworn statement before the FSAC. Hazelton then told Steptoe that he believed Barch and that he "thought that the information [he] received from Barch was accurate." (J.A. at 1547.) Hazelton concluded that the film "bears out everything that was said." (J.A. at 1556.) Steptoe found Hazelton to be a very credible witness.

Steptoe also interviewed Rob Russen, Rick Parker's former business partner, who had been a partner in the promotion of the September 1992 fight card. Russen told Steptoe that Cobb's comeback was a "smoke mirage," (J.A. at 1001) and that everyone in the know at the promotion knew that Barch was going into the ring with Cobb to take a dive. Russen told Steptoe that when he went to Parker's hotel room after the fight he smelled marijuana smoke and saw Barch and Cobb come out of the bathroom in a cloud of marijuana smoke. He also told Steptoe that there had been cocaine in the room, and that "they" had it. (J.A. at 998.) Steptoe interpreted Russen's statement that "they" had cocaine to refer to Cobb and Barch. Cobb, however, later testified that he was in Parker's hotel room after the fight only because he had to go there in order to get paid for the fight. Steptoe found Russen extremely credible and knowledgeable regarding Parker's operation.

Next, Steptoe interviewed Tim Anderson, Cobb's originally scheduled opponent, by telephone. Anderson told

Steptoe that Parker had substituted Barch for him at the weigh-in. Anderson said that Parker's purported reason for the substitution -- that Anderson was demanding more money -- was false, and that the real reason for the substitution was that Barch would "lay down" for Cobb.

Finally, Steptoe and *SI* reporter William Nack interviewed Barch in person. Barch told them the same story he had told Robinson over the phone, providing more details. Some portions of Barch's account, however, are notable because they arguably cast some doubt on Barch's veracity. First, Barch told them that Cobb came into his hotel room to discuss how the fight would play out. Barch said that at that meeting Cobb told Barch that his shoulder was injured. Barch told the *SI* reporters that he did not believe Cobb, but that he assured Cobb that he would not hit him in the shoulders. The *SI* investigators agreed that it did not appear from the videotape of the fight that Cobb had a shoulder injury at the time. However, the *SI* staff decided to print Barch's statement regarding the injury, concluding that they were not reporting that Cobb, in fact, had a shoulder injury, but simply that he had told Barch he had a shoulder injury. Second, Barch told the *SI* reporters that he was puzzled that his post-fight drug test had come back positive for cocaine, because he had filled his specimen bottle with tap water. The *SI* investigators acknowledged that it would be impossible for the test to come back positive if he had submitted only tap water. The *SI* journalists acknowledged that this story was "bizarre," and they decided to simply present Barch's tap water story to the readers in the article, allowing readers to draw their own conclusions. Robinson testified that the only explanation he could come up with was that Barch had added tap water to urine in an unsuccessful attempt to doctor the sample, rather

than simply filling the specimen bottle entirely with tap water. The *SI* staff sought out information about Barch's criminal history. Barch volunteered some information, including that he had been arrested for passing bad checks, had used drugs, and had once been accused of rape. *SI* later found out that Barch had recently been arrested for intent to deliver a controlled substance, a fact that Barch had not mentioned. When Robinson confronted Barch with this information over the telephone, Barch hesitated and asked if he could call back. *SI's* in-house investigator subsequently discovered that Barch had become an informant for the Narcotics Division and was working on a case undercover. Nack and Steptoe ultimately concluded that they believed Barch, because Barch had been consistent regarding the details of the story. They also noted that Barch had incriminated himself in his statements, and that Barch did not seem to harbor any animosity toward Cobb.

Steptoe then met with Parker, who denied most of Barch's allegations. Parker did mention, however, that he had substituted Barch for Anderson because he did not want to allow Anderson to "derail [him]" by beating Cobb.[1]

Steptoe never interviewed Cobb in person, but she did repeatedly try to contact Cobb in order to hear his side of the story. Steptoe asked each person she interviewed for information on how to contact Cobb. She asked Parker to

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[1] Anderson had previously beaten former NFL lineman Mark Gastineau in a fight promoted by Parker. The *SI* article alleged that Parker had tried to build up the win/loss records of Cobb and Gastineau in order to secure a fight with a well-known, highly-ranked boxer, producing a large payday for the promoter and his boxer.

have Cobb contact her. She left messages for Cobb's handler and his Hollywood agent. She called Cobb's wife, sent faxes to Cobb's home, and called a friend of Cobb. On September 26, 1993 Cobb telephoned Steptoe. Cobb denied the allegation that the fight was fixed and told Steptoe to watch the videotape of the fight. When Steptoe offered to fly to Nashville to interview him personally, Cobb declined. Steptoe did not ask Cobb any questions concerning the drug use allegations. She testified that she was unable to, because Cobb "rushed [her] off the phone." (J.A. at 1070.) Following this phone conversation, Steptoe made efforts to contact Cobb again, to "give him another chance [to] respond to the allegations," including the drug allegations. (J.A. at 1071.) Steptoe left voice messages for Cobb, but was unable to speak with Cobb again.

Aside from the interviews, the *SI* journalists repeatedly reviewed the videotape of the Cobb-Barch fight. Robinson, Nack, and Steptoe each reviewed the tape and independently concluded that Cobb was fighting in a contrived fashion. In addition, *SI* fact-checker Sally Guard reviewed the tape. Although Steptoe and Guard did not have extensive experience with the sport of boxing, Robinson and Nack did. Nack had covered dozens of fights since 1972 for various publications. Robinson had served as *SI's* boxing editor for nine years, and had seen hundreds of boxing matches.[2]

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[2] In deciding to publish the article, Robinson also found it important that Cobb had tested positive for marijuana immediately after the fight. According to Robinson, Cobb's use of drugs while training for his first fight in over four years suggested that Cobb was not concerned about the fight or what would happen in the ring. (J.A. at 1664-66.)

As Cobb notes, however, the *SI* investigation was by no means exhaustive. *SI* never directly interviewed the referee who worked the match or the ringside judges. Nor did *SI* ever obtain the transcript of Barch's sworn testimony before the FSAC. Nor did *SI* ever consult a boxing expert (other than their own experienced boxing journalists) concerning Cobb's performance. Further, the *SI* investigators never expressly and directly asked anyone other than Barch whether Cobb was a knowing participant in the sham.

## III. Legal Analysis

*SI* challenges the jury's verdict on several grounds. First, *SI* argues that Cobb failed to prove, by clear and convincing evidence, that *SI* acted with actual malice. Second, *SI* argues that the district court improperly excluded evidence regarding other fixed fights -- evidence which *SI* claims provided additional corroboration for Barch's story. Third, *SI* argues that the trial court improperly instructed the jury that Cobb needed to prove the actual falsity of the statements in the article by a preponderance of the evidence, rather than by the higher standard of clear and convincing evidence. Fourth, *SI* contends that the statement regarding Cobb's cocaine use after the fight was substantially true, and thus, cannot be the basis for liability. Finally, *SI* argues that it is entitled to a new trial on liability and damages because the compensatory damage award was grossly excessive. Because we find that the record does not support a finding of actual malice we consider only *SI's* first argument, and reverse the district court's order and judgment.

**A. Actual Malice**

In *New York Times Co. v. Sullivan*, the Supreme Court announced that in a libel suit brought by a public official the plaintiff must prove, by clear and convincing evidence, that the defendant acted with "actual malice" in order to impose liability. 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). This rule is founded on the concept that First Amendment freedom of speech protections require a certain degree of "breathing space" in order to survive. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). A majority of the Court later clarified that the *New York Times* standard applies with equal force to all public figures, not just public officials. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (opinion of Warren, C.J., concurring); *cf. Butts*, 388 U.S. at 155, 87 S. Ct. 1975 (opinion of Harlan, J.) (suggesting a lower standard for public figures who are not public officials, which would require only a showing that defendant's conduct was an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers); *see also Harte-Hanks*, 491 U.S. at 666, 109 S. Ct. 2678 ("Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court.").

The actual malice standard does not refer to a showing of ill will or malice in the ordinary sense. Rather, it requires that the plaintiff demonstrate that "the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to

whether or not it was true." *Harte-Hanks*, 491 U.S. at 667, 109 S. Ct. 2678 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)). The fact that the defendant published the defamatory statement in order to increase profits is insufficient to prove actual malice. *Id.* Rather, a showing of actual malice requires at least a showing that the statements were made with a "reckless disregard for the truth." *Id.* A "reckless disregard for the truth" means that the defendant "must have made the false publication with a 'high degree of awareness of . . . probable falsity.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)) (alteration in original). A failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. *Id.* at 688, 109 S. Ct. 2678. Instead, there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)). Thus, the failure to investigate, alone, will not support a finding of actual malice, but the "purposeful avoidance of the truth" may do so. *Id.* at 692. In a case where the defendant is reporting a third party's allegations, the standard of reckless disregard may be met where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 688, 109 S. Ct. 2678 (quoting *St. Amant*, 390 U.S. at 732, 88 S. Ct. 1323).

The question whether there is sufficient evidence in the record to permit a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11, 104 S. Ct. 1949, 80 L. Ed. 2d 502

(1984). The unique nature of the interest protected by the actual malice standard requires that reviewing courts conduct an independent review to determine whether that standard has been met. As the court stated in *Bose*, "[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" 466 U.S. at 511, 104 S. Ct. 1949. In making this determination, the reviewing court must consider the factual record in full. *Harte-Hanks*, 491 U.S. at 688, 109 S. Ct. 2678. Credibility determinations made by the trier of fact are reviewed under a clearly erroneous standard, but the reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (quoting *New York Times*, 376 U.S. at 285, 84 S. Ct. 710) (alterations in original).

Here, the statements in issue are 1) that Randall "Tex" Cobb was a knowing participant in the fixing of his September, 1992 boxing match with Sonny Barch, and 2) that Cobb used cocaine with Barch after the boxing match. After a full review of the record, we conclude that there is insufficient evidence to support the jury's finding that *SI* acted with actual malice as to these statements.

Cobb argues that circumstantial evidence presented at trial established actual malice. Cobb contends that he demonstrated actual malice in three ways: 1) with evidence that *SI* had reason to doubt Barch, and never dispelled such doubt, 2) with evidence that *SI* intentionally published known

falsehoods, and 3) with evidence that *SI* purposefully avoided learning the truth. Cobb's evidence falls far short of the clear and convincing standard on all three counts.

First, Cobb argues that the record shows that *SI* had reasons to doubt Barch. It is certainly true that *SI* was aware of Barch's sketchy past. But the *SI* reporters acted accordingly. They attempted to corroborate as much of Barch's story as possible, recognizing that they would probably be unable to corroborate any one-to-one conversations (with no witnesses) between Barch and Cobb, unless Cobb admitted to the allegations. They investigated Barch's criminal background, confronted Barch with an arrest that he had not volunteered, and discovered that he was acting as an informant in cooperation with the police. That Barch did not disclose his most recent arrest to *SI* did not give the journalists any additional reason to doubt what Barch had told them, given that Barch had been instructed by the police not to compromise their investigation by disclosing his arrest. Moreover, the fact that Barch was being paid for his first person account does not, in itself, support a finding of actual malice. Cobb points to the tap water urine test story as evidence that *SI* had reason to doubt Barch. The *SI* staff admitted that they found this story bizarre. But they also testified that they thought he could have meant that he added tap water to his urine sample, rather than just completely substituting tap water. If that were the case, then a positive test for cocaine would still be plausible. Further, the tap water story was tangential to the real story -- which was his admission of participating in fixed matches. The *SI* reporters uncovered no particular reason to think that Barch was lying in his accounts of those activities, or in his own admissions of drug use. Although the tap water story was curious, it was not

an "obvious reason" to doubt Barch's veracity or the accuracy of his reports with respect to the two statements at issue here.[3]

Second, Cobb argues that *SI* intentionally published known falsehoods, indicating actual malice. Cobb points to *SI's* removal of a sentence clarifying that Cobb tested positive for marijuana, rather than cocaine. The final version of the article read,

> Barch does say that he and Parker had snorted cocaine until three o'clock on the morning of the fight, and that after the show he, Parker and Cobb shared a half ounce of cocaine. The Florida commission suspended both Barch and Cobb after the positive tests. (J.A. at 146.)

Certainly, this paragraph is misleading. Because the last sentence follows immediately after Barch's allegation that he and Cobb used cocaine together, it implies that Cobb tested positive for cocaine. But the positive drug test is not the statement at issue in this case. The district court held that any implication in the article that Cobb's urine sample taken immediately after the fight tested positive for cocaine, rather than marijuana, was not actionable because it was substantially true. The "sting" of the statement was that Cobb must have used an illegal drug *prior* to the match. The article does not suggest that any drug test was done after the alleged drug use in the hotel room following the fight. Moreover, *SI*

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[3] The *SI* reporters decided to include in the article the tap water story, Barch's admission of drug use, and the positive test results in order to permit the readers to draw their own conclusions about this one peculiar aspect of Barch's account.

printed a clarification explaining that Cobb had tested positive for marijuana, not cocaine.

The next falsehood Cobb points to is that his shoulder was injured. But the *SI* piece never states that Cobb's shoulder was, in fact, injured. Nor does it indicate that Barch said it was, in fact, injured. To the contrary, the article simply stated that when Cobb met with Barch before the fight Cobb *claimed* he was injured. Furthermore, the district court granted summary judgment with respect to any libel claim Cobb might have based on this statement because it was substantially true.

Cobb next contends that *SI's* false representation that Barch wrote a first-person narrative included in the article was evidence of actual malice. As *SI* points out, however, the article is merely a narrative attributed to Barch and "ghost written" by a *SI* reporter. The fact that *SI* composed the narrative from notes of Barch's spoken narrative is not evidence of actual malice with respect to the statements at issue, made in the body of the article. *SI* reporters testified that ghost writing such first person accounts for athletes was standard practice. Cobb cites no authority suggesting that this practice could constitute evidence of actual malice with respect to other statements in an article. In any event, all three of these purported falsehoods are collateral to the two statements at issue here, and do not clearly and convincingly demonstrate that *SI* acted with actual malice with respect to those statements.

The third, and strongest, argument Cobb makes in support of the jury's finding of actual malice is that the *SI* reporters purposefully avoided learning the truth. Cobb

contends that *SI's* avoidance of the truth was shown by *SI's* failure to ask any of the interviewees whether Cobb participated in the fix. Cobb asserts that *SI's* failure to contact the referee, the ringside judges, or the fight physician further supports this conclusion. The Supreme Court's decisions in *Harte-Hanks* and *Butts* guide our determination in this regard. In *Harte-Hanks,* the defendant published an article accusing plaintiff of a scheme to blackmail a political opponent. The defendant interviewed the informer (whose account of the scheme the article was based upon), the plaintiff, and five other witnesses, each of whom had allegiances to plaintiff. The plaintiff and the five other witnesses all denied the informer's allegations. There was, however, a key witness who was not interviewed. That witness had allegiances to the informer (she was the informer's older sister), and had been present at the meeting with the plaintiff in which the blackmail scheme was allegedly discussed. The court determined that the failure to investigate was likely "the product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the informer's] charge," and upheld a jury verdict in favor of the plaintiff. *Harte-Hanks*, 491 U.S. at 692, 109 S. Ct. 2678.

In *Butts*, the underlying facts were somewhat similar to those of this case. The defendant's article accused plaintiff of "fixing" a football game by giving away plays, strategies, and secrets to the other team. The informer was someone who supposedly overheard the conversation between the plaintiff and the other team's head coach and took detailed notes of the conversation. The Court upheld a jury verdict in favor of the plaintiff because elementary precautions were ignored, despite the fact that the story was not "hot news." Among the investigatory shortcomings were the following: the defendant

1) failed to interview a witness who was allegedly present with the informer at the time he overheard the call, 2) failed to examine the informer's notes that were taken at the time of the phone call, 3) failed to consult with anyone knowledgeable in the sport (the magazine was not a sports publication), and 4) did not screen the film of the game or attempt to find out if the opposing team had adjusted its game plan after the purported phone call.

We conclude that the record in this case reveals undisputed facts which make it readily distinguishable from the *Harte-Hanks* and *Butts* cases. Unlike the *Harte-Hanks* case, in this case the *SI* reporters did obtain information from at least one independent source corroborating Barch's story. *SI* interviewed Hazelton, undoubtedly a boxing expert, who told them that the fight tape seemed to confirm Barch's story. Hazelton also told the *SI* reporters that Cobb arrived very late for the fight, which he found suspicious. Most importantly, Hazelton told them that he thought that Cobb's performance "lacked enthusiasm." While not directly stating, in so many words, that Cobb was knowingly participating in the fix, Hazelton provided powerful corroboration for Barch's story. Although *SI* did not interview the referee or the ringside officials, Hazelton did tell *SI* that he spoke with the ringside officials who agreed that the outcome was pre-determined. In addition, several *SI* journalists, two of whom had significant experience covering the sport of boxing, viewed the tape and arrived at the conclusion that Cobb had been in on the fix. While the *SI* journalists are obviously not independent experts, their conclusions after viewing the videotape provided *SI* with further reason to believe Barch's story.

The differences between *Butts* and the present case are

obvious. In *Butts,* nobody -- not even the journalists -- viewed the game film to corroborate the informer's story. The defendant did not consult with a single person knowledgeable in the sport of football or show the film to such an expert. The defendant did not have an independent witness, like Hazelton, to corroborate the story. In short, the investigation in the present case was far more comprehensive than the investigation in either *Harte-Hanks* or *Butts*. Cobb's argument that *SI* should have interviewed the referee and the ringside officials tends to show that *SI* might not have acted as a prudent reporter would have acted. But the actual malice standard requires more than just proof of negligence. It requires a reckless disregard for the truth. The record does not support the conclusion that *SI* intentionally avoided learning the truth, unlike the defendants in *Harte-Hanks* and *Butts*. The jury's verdict cannot stand without significantly infringing on the "breathing space" that the Court has carved out for the freedom of speech.

## IV.

Because we find that the record does not support a finding of actual malice, we need not address defendant's additional arguments. For the foregoing reasons, we reverse the district court's order and judgment, and remand for entry of judgment in favor of the defendant.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**No. 3:94-0836**

**[Filed January 11, 2000]**

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|---|---|
| RANDALL CRAIG COBB, a/k/a RANDALL "TEX" COBB, | ) |
| Plaintiff, | ) |
| v. | ) |
| TIME, INC., d/b/a SPORTS ILLUSTRATED, | ) |
| Defendant. | ) |

**JUDGES:**
ROBERT L. ECHOLS, UNITED STATES DISTRICT JUDGE.

**MEMORANDUM**

Presently pending before the Court are: (1) Randall Craig Cobb's Motion to Amend Judgment (Docket Entry No. 320), which Defendant opposes in part; (2) Defendant's

Renewed Motion for Judgment as a Matter of Law or in the Alternative for a New Trial or Remittitur (Docket Entry No. 319), to which Plaintiff responds in opposition; and (3) Defendant's Renewed Motion for Judgment as a Matter of Law or in the Alternative for a New Trial or Remittitur on the Issue of Punitive Damages (Docket Entry No. 359), which is likewise opposed.

## I.FACTS

Defendant Sports Illustrated ("SI") is a well-known and respected national sports magazine with a huge national and international circulation. Plaintiff Randall "Tex" Cobb is an actor, kickboxer, and former professional heavy-weight boxer, who in 1992-93 was making a comeback in the ring after an absence of several years.

In its October 4, 1993, issue, SI published an article entitled "The Fix Was In" about fight fixing in professional boxing. In general, the article was derogatory about professional boxing in the lower ranks and concentrated on the unscrupulous promotion of these boxers in attempts to create opportunities for big box office purses. A number of corrupt examples were cited. The article's primary focus was coverage of a boxing match on September 15, 1992, which allegedly was fixed with the knowing participation of Cobb, promoter Rick "Elvis" Parker, and a last minute stand-in fighter named Paul "Sonny" Barch.

The article contained a number of disparaging comments about the lack-luster performances of the boxers in the Cobb-Barch fight, as well as several derogatory factual errors. The gravamen of Plaintiff's complaints, however,

evolve around the defamatory statements that Cobb (1) knowingly participated in a fixed fight with Barch and (2) shared cocaine with Barch after the fight.

SI was first informed about the so-called "fixed fights" through an unsolicited telephone call from Barch approximately one year after the Cobb-Barch fight. Barch demanded money for his information about the fixed fights and told SI that if it did not pay him $15,000 for the information within ten days, he would take it to another publication immediately. SI convinced Barch to wait ten days until it could check out his story. SI agreed to pay him the money if his story was substantiated.

This agreement was contrary to SI's announced policy of prohibiting the payment of money to sources of information for its magazine articles. SI's agreement was contingent upon Barch's revealing all the facts concerning his fixed fight with Cobb, a well-known national figure. Specifically, SI wanted to know about Barch's allegations that Cobb knowingly participated in a fixed fight and used drugs. SI justified the payment of the money to Barch by creating a "sidebar" article to the main article, which was supposed to be Barch's personal account of the fight. The sidebar article contained a byline indicating it was written by Barch, although it is undisputed that Barch wrote not a word, and the personal account actually was written by an SI writer after interviewing Barch. SI claimed this was customary, and Barch did grant his approval when the final personal account story was read to him over the telephone.

Although Barch told various other people that Cobb had knowingly participated in the fixed fight and shared

cocaine with him after the fight, there was no independent corroboration of these events. Defendant knew Barch had a criminal record, had recently been arrested on drug charges, was a police informant, and was demanding to be paid quickly. Barch's whereabouts now apparently are unknown, and he was not available to testify at the trial.

At the time the article was written, the key writers and editor at SI knew of the lack of corroboration of the defamatory statements in the article, as well as the existence of certain inaccuracies, omissions, and misleading statements. SI's ten-day deadline was self-imposed, and publication of the article could have been delayed to allow more time for investigation and corroboration.

Although the events were not "breaking" news because the fight had occurred over one year earlier, SI decided to maintain the ten-day deadline originally set. The writers, fact checker, and editor did not investigate Cobb's pre-fight training regimen, or review the pre-fight physical examinations or investigate Cobb's physical condition or alleged injuries. They did not interview the referee, the fight physician, or the ringside judges. They did not review a transcript of Barch's sworn testimony before the Florida State Athletic Commission ("FSAC") prior to publishing the article, although they were aware of it. These SI employees also failed to disclose in the article that Barch agreed to testify before the FSAC only after negotiating a deal whereby the FSAC agreed to waive an outstanding fine against him and to lift his suspension from boxing in exchange for his testimony.

SI writers traveled to Georgia, Arkansas, and Florida to interview witnesses and gather information to support

Barch's story, but they did not fly to Philadelphia to interview Cobb. Rather, they attempted to contact him by phone and fax mid-way through their investigation. Ultimately, Cobb called SI the day before the story "closed," adamantly denying Barch's allegations.

Despite these circumstances, SI used a seven-paragraph narrative of the fight-fixing episode to lead off the thirty-four paragraph story. Cobb's denial appears at paragraph fourteen, on the page following SI's statement that "much of [Barch's] account of [promoter Rick] Parker's machinations was corroborated in SI interviews with a former partner of Parker's. . . and three fighters," and beneath the sidebar article attributed to Barch alleging the fight was fixed and captioned in large type "I Walked Straight into Him."

The article in SI had a devastating impact on Cobb. After its publication, Cobb's careers as a boxer and actor languished, personal appearance opportunities vanished, and a lucrative endorsement contract was canceled. His public persona as a tough guy was tarnished and his reputation for integrity was diminished.

As a result of the article, Cobb felt embarrassed, humiliated, and ostracized. He suffered fits of rage and deep depression and sought the professional services of a psychiatrist for his mental and emotional problems. For a period of time, he was forced to live out of his car and occasionally with friends. He relied on a few friends for money. Subsequently, he was unable to gain self-esteem or recover from the detrimental effects of the article on his reputation and career opportunities. Cobb incurred expenses in attempting to recover his damaged reputation and economic

losses, as well as expenses for mental health treatment and legal fees.

Following the publication of "The Fix Was In," SI published a clarification of its account of Cobb's drug test after the fight, informing readers that "the reason that Cobb failed was marijuana, not cocaine." With that exception, SI maintained, up to and throughout the trial, that the remainder of the article was true, fair, and non-libelous. SI also contended its employees acted reasonably and professionally and were not at fault for any of their acts and omissions.

## II.DISCUSSION

### A. Rule 50 Motions for Judgment as a Matter of Law

The standard generally applied to motions for judgment as a matter of law[1] is modified with regard to defamation cases. Although credibility determinations are still reviewed under a clearly erroneous standard, a district court

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[1] In other contexts, the test is "whether there is sufficient evidence to raise a question of fact for the jury." *Smith Corona Corp. v. Pelikan, Inc.*, 784 F. Supp. 452, 460-61 (M.D. Tenn. 1992). Sufficient evidence will be found unless, when viewing the evidence in the light most favorable to the non-movant and drawing all justifiable inferences in his or her favor, the court finds either a complete absence of proof on the issues or no controverted issue of fact upon which reasonable persons could differ. *American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 157 (6th Cir. 1997). In making this determination, the court may not weigh the evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. *Smith Corona*, 784 F. Supp. at 461.

must independently examine the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1229 (6th Cir. 1992). In particular, the court must independently examine the record to decide whether, as a matter of law, the evidence clearly and convincingly supports a finding of actual malice. *Id. Accord Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

The test of actual malice is a subjective one, focusing on the defendant's state of mind at the time of publication. *See Herbert v. Lando*, 441 U.S. 153, 160 (1979). There must be clear and convincing evidence that the defendant knew the material was false, "in fact entertained serious doubts" as to its accuracy, or had a high degree of awareness of probable falsity. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

Nevertheless, no direct evidence of malice is required to support a judgment for the plaintiff. Rather, cumulative circumstantial evidence will suffice. *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 411 (6th Cir. 1991). Examples of such evidence include "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of statements, *Harte-Hanks*, 491 U.S. at 692, and facts and circumstances indicating that the publisher had reason to doubt the veracity of an informant or the accuracy of his reports. *Id.* at 688. In analyzing whether a plaintiff has shown malice, a court "must look at each source to determine whether it was reliable and whether it indicated that more research was required to determine what the truth was. In the end, all of the statements may be considered together to

determine whether they as a whole can show recklessness." *Perk*, 931 F.2d at 411.

In this case, the sole source of the defamatory statements was an informant known by SI to have a history of check-forgery and drug use, who had recently been arrested on drug charges, who had struck deals with the FSAC and the Memphis police whereby he received benefits in exchange for participating in their investigations of illicit activity, and who demanded payment from SI in exchange for his story. SI obtained no independent corroboration of the salacious details it used to introduce its "The Fix Was In" or of Cobb's alleged cocaine use after the Cobb-Barch bout, but it proceeded to publish the information despite the questionable motivation and indices of unreliability that surrounded Barch's story. Moreover, SI knew Cobb denied the allegations, but it failed to seek out other witnesses who might have corroborated his version of events.

The Court finds that these facts and circumstances, when viewed in context of the record as a whole, suffice to show by clear and convincing evidence that SI published the defamatory statements in reckless disregard of their truth or falsity. Accordingly, Cobb has met his burden to show actual malice. SI is not entitled to judgment as a matter of law, and its Motions pursuant to Rule 50 are DENIED.

B. Rule 59(a) Motions for New Trial

A new trial is warranted under Rule 59(a) when a jury reached a "seriously erroneous result" as evidenced by instructional error or excessive damages. *See Holmes v. City of Massillon*, 78 F.3d 1041, 1046 (6th Cir. 1996). While a

new trial may be granted if there was substantial error in the admission or exclusion of evidence or if the Court committed error in its jury instructions, *see Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940), the jury's verdict should be accepted if it is one which could reasonably have been reached, *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982).

Defendant moves the Court to exercise its discretion and order a new trial pursuant to Rule 59(a) on the following grounds: (1) that the Court's limiting instructions with regard to certain materials improperly prevented the jury from considering this evidence with regard to the journalists' state of mind; (2) that the jury instructions concerning actual malice were conflicting and confusing; (3) that falsity must be proven by clear and convincing evidence, not by a mere preponderance; (4) that SI was entitled to an instruction on 'neutral reportage;' and (5) that the compensatory and punitive damages awards were excessive. The Court reviews these contentions in light of the Supreme Court's directive that, in reviewing a case in which both parties assert rights under the First Amendment, the Court must make an independent examination of the whole record so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

Having reviewed the record, including the challenged evidentiary rulings and jury instructions, the Court finds the verdict of liability is one which a jury could reasonably have reached. The Court finds that its limiting evidentiary rulings were proper, and that the instructions given throughout the trial with regard to actual malice, taken as a whole and in

light of the preliminary instructions and final jury charge, correctly set forth the rules of law to be applied. Furthermore, the instructions were neither confusing nor misleading. For these reasons, neither the evidentiary rulings nor the jury instructions provide a basis for granting a new trial. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156-57 (1966) (plurality opinion).

With regard to whether falsity must be proved by 'clear and convincing' evidence, the Court notes that, although a few courts have imposed this requirement, *see, e.g., Buckley v. Littell*, 539 F.2d 882, 889-90 (2nd Cir. 1976); *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987), the established practice is that falsity need only be proven by a preponderance of the evidence, *Rattray v. City of National City*, 36 F.3d 1480, 1487 (9th Cir. 1994); *accord Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2nd Cir. 1969). To impose a higher standard would result in a significant change in the burdens on plaintiffs and upset the balance that courts have struck between the competing interests involved in defamation litigation. *See Bressler*, 971 F.2d at 1241-42 (Batchelder, J., dissenting). For these reasons, the Court finds that it did not err in instructing the jury that falsity need be proven by a preponderance of the evidence.

With regard to Defendant's contention that the Court erred in refusing to charge the jury regarding the 'neutral reportage' doctrine, the Court notes that this doctrine has not been recognized in the Sixth Circuit. Accordingly, the Court has no obligation to instruct the jury as to this concept. Furthermore, even if this doctrine were recognized by the Sixth Circuit in appropriate cases, it would be inapplicable

here. To avoid liability under a neutral reportage defense, the publisher must demonstrate its "accurate and disinterested reporting of serious charges made against a public figure by a responsible, prominent organization." *Harte-Hanks*, 491 U.S. at 660 n.1 (quoting lower court and citing cases). Barch, the source on which SI reported, was not a responsible, disinterested party and his statements did not accurately report any charges then pending against Cobb. For these reasons, the Court finds it did not err in refusing to give an instruction on neutral reportage.

Defendant also contends it is entitled to a new trial because the verdicts of $8.5 million in compensatory damages and $2.2 in punitive damages show jury's bias, passion, or prejudice. The Court rejects this contention. Plaintiff's proof showed that he suffered substantial pecuniary and nonpecuniary losses as a result of Defendant's wrongful conduct. For example, Plaintiff lost a lucrative product endorsement immediately after the libelous statements were published, and other opportunities in athletic and entertainment fields were not forthcoming. A jury could reasonably conclude that "The Fix Was In" caused Plaintiff to lose substantial net income from boxing, acting, and product endorsements. Additionally, Plaintiff suffered substantial nonpecuniary damages as a result of psychological distress, damage to significant personal and familial relationships, concern about his future, public humiliation, tarnish to his reputation, and other related harms. Finally, the punitive damage award approximated the profits SI earned on one issue of its magazine. In other words, the amount of the award approximates the disgorgement of the profits SI earned on the single weekly issue of the magazine containing the libelous article. In light of the proof presented regarding these

facts and circumstances, the Court finds that the verdicts were not excessive or the result of the jury's passion or prejudice.

In sum, the Court has considered each of Defendant's contentions regarding evidentiary limitations, jury instructions, and damages, and finds no basis for concluding there was error such that the jury's verdicts were unreasonable. Accordingly, Defendant's Motions pursuant to Rule 59(a) are DENIED.

C. Motions for Remittitur

A federal jury verdict is reviewed under Federal Rules of Civil Procedure 50(b) and 59, which permit the court to interfere with a verdict, (1) under Rule 50, where no substantial evidence is offered on which the jury can base its award, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107 (4th Cir. 1991), and (2) under Rule 59, where the award "clearly exceeds the amount which, under the evidence in the case, was the maximum that a jury could reasonably find to be compensatory for the plaintiff's loss," *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993). In determining the maximum reasonable jury verdict under Rule 59, federal courts are to be guided by the law of the forum state. *People's Bank & Trust Co. v. Globe Int'l, Inc.*, 786 F. Supp. 791, 800 (W.D. Ark. 1992).

Tennessee law requires a plaintiff to prove damages with a reasonable degree of certainty. *Pinson & Assocs. Ins. Agency, Inc. v. Kreal*, 800 S.W.2d 486, 488 (Tenn. App. 1990). This does not mean, however, that the trier of fact must be able to perform an exact computation or reach mathematical certainty as to the amount of damages. *Id.*

Rather, the plaintiff meets his burden where he lays a foundation enabling the trier of fact to make a fair and reasonable assessment of damages. *Id.*

The Court has reviewed the record to determine whether the $8.5 million compensatory damage award exceeds the maximum reasonable amount. The proof on this issue includes testimony from an accounting expert Jay Shapiro, C.P.A.; movie and entertainment agent Merritt Blake; boxing promoter Ron Weathers; treating psychiatrist Dr. Robert Hunt; Cobb himself; and other witnesses. Relevant documentary evidence includes, among other items, two reports by Shapiro (Pl.'s Exs. 80 and 81); Cobb's boxing record and lists of purses he received (Def.'s Exs. 45, 46, 98, and 99); and a list of amounts Cobb earned as a featured actor and entertainer (Def.'s Ex. 45 at 3).

Shapiro's initial assessment of the economic benefit Cobb lost as a result of the defamatory publication totaled $9.267 million divided as follows: $2 million in professional boxing income; $2.325 million in income from boxing-related activities such as martial arts exhibitions, "Tough Man" competitions, and martial arts schools licensed to use Cobb's name and reputation; and $4.942 million in entertainment-related income from film and television acting and product endorsements. At trial Shapiro testified that he had revised this estimate downward to $6.717 million, divided as follows: $1.25 million in lost professional boxing income; $2.325 million in lost boxing-related income; and $3.142 million in lost entertainment-related income. The estimates are based on the assumption that Cobb's athletic career would have continued until he was forty-five years old, and that his acting career would have continued until he was sixty.

Shapiro's estimate that Cobb lost $1.25 million in boxing income was bolstered by Ron Weathers' testimony that Cobb had a seventy to eighty percent chance of fighting Tommy Morrison for the world heavyweight title before SI's article was published, and that such a fight became unsaleable after the publication.[2] As to evidence of the amount of damages resulting from loss of such a possibility, Cobb had previously testified that his 1982 heavyweight title fight with Larry Holmes generated millions of dollars in revenues, and that his contract entitled him to a third of the gross revenues, including "a third of the TV money, a third of the on-site location money, a third of the revenue generated by the concessions, [and] a third of the overseas venue." *Tr.* at 500. Cobb testified that he personally received about $115,000 for the fight, although his contract entitled him to approximately $2 million. Based upon the testimony, a heavyweight championship fight in 1994 or 1995 would have generated more revenue because of the lucrative television and pay-for-view cable contracts.

With regard to entertainment-related income, Shapiro made the assumptions that (1) Cobb's potential for entertainment-related earnings, absent the defamatory publication, would have approximated that of Bob Uecker or Alex Karras, who also had careers in athletics and entertainment, and whose acting compensation exceeded $200,000 per television season; and (2) Cobb would make three film or television appearances each year until he was

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[2] Although the proof showed that Morrison lost his title around the time of publication, the jury could reasonably infer that, if a Cobb-Morrison fight had been saleable, then a bout between Cobb and a later title-holder would also have been saleable.

sixty. His estimate that Cobb lost at least $3.142 million in entertainment-related earnings is generally supported by the testimony of Merritt Blake, Cobb's agent during much of his career. Although Blake did not estimate the total damages Cobb had suffered as a result of the defamatory publication, he testified (1) that Cobb would likely have had six to ten acting jobs per year had it not been for the publication; (2) that he could have been employed as an actor steadily; and (3) that Cobb had both an appealing personality and acting talent, such that he was in particular demand.

The documentary proof showed that Cobb earned between $15,000 and $64,000 dollars per film for his work in feature films, and that Cobb had the potential to earn income from product endorsements as well as from film and television acting. For example, at the time the article was published, Cobb had a contract to promote Old El Paso taco sauce under which he could have earned $50,000 in 1993 and which included renewal possibilities under which Cobb could have earned $75,000 in subsequent years.

Cobb's proof of emotional distress and psychological damages included his own testimony, as well as the testimony of Dr. Robert Hunt, a psychiatrist, and others. Dr. Hunt testified that the impact of the SI article on Cobb was "cumulative and progressive;" *Tr.* at 1223; that Cobb felt devastated by the fact that the magazine he had most admired "accused [him] of a crime that was the most personally insulting of his core integrity and life commitment;" *id.* at 1224; and that "through this one event, [Cobb felt that the course of his personal destiny] was changed for him and he felt a tremendous loss, a profound helplessness and a rage that he could barely control." *Id.* Cobb's personal account

regarding his psychological and emotional reactions to the article was compatible with Hunt's professional observations. They provide sufficient evidence from which a jury could reasonably infer substantial emotional distress and psychological harm.

Cobb's testimony included a personal discourse of the devastating impact the article had upon his life, both emotionally and professionally. He also explained the effect of the article on his reputation, career, and self-esteem. According to Cobb and other witnesses, in 1993, Cobb was a popular public figure with a considerable nationwide recognition. He had fought Larry Holmes for the World Heavyweight Championship, as well as Leon Spinks, another world champion, and other boxing contenders. He also had fought for the national kick-boxing championship, and was the only person to have competed for the national championship in both sports. In addition, he had appeared in a number of movies, and as a guest on several national and local television programs. He was featured in at least one national advertising campaign for a reputable food product, with options to renew for five years.

After several disappointments and setbacks in his personal life, including boxing injuries, admitted drug addiction, marriage problems, and financial woes, Cobb was attempting to make a boxing comeback and to rejuvenate his promising movie career and consumer product endorsement. He was a 10-0 in his boxing comeback, and he and his agent had made preliminary inquiries into a major heavyweight title fight.

After the accusatory article in Sports Illustrated, Cobb

suffered severe psychological damage and emotional trauma which continued for an extended period of time. Based on his testimony, he was embarrassed, humiliated, and ridiculed in various ways. He became angry, sad, depressed, and withdrawn. On occasion, he was overcome by uncontrollable fits of rage. On other occasions, he cried and became very depressed. He also began having thoughts of suicide and finally was forced to seek help from a psychiatrist. Because he was not able to control his emotions, he withdrew and was fearful he might hurt someone else during one of his unpredictable trauma attacks. Consequently, he began to avoid going out in public and spent more and more time by himself, often driving alone in his automobile for long periods of time. He lost friendships and was ostracized by former business associates and fight promoters. His mood swings adversely affected his marriage. He left home and began to sleep in his automobile. He was without funds, except for loans from a few friends. He later moved from Nashville to Philadelphia in an effort to escape humiliation and to avoid facing friends and acquaintances. He felt alone, abandoned, and helpless to fight back to regain his reputation and to secure employment. Cobb believed his reputation had been indelibly tarnished and he was labeled forever as a fraud and a fake.

Cobb's evidence that he lost over $6.7 million income as a result of the SI article was hotly contested by the Defendant. Defendant's evidence included proof that in thirty-one of the thirty-nine fights for which Plaintiff received individual income between 1977 and 1993, Plaintiff earned $3,000 or less. Def.'s Ex. 45. In fourteen of those fights, he earned $800 or less. *Id.* Furthermore, during the period between the Spinks-Cobb bout in 1988 and his last bout in

1993, Cobb did not fight in a single bout with an announced purse in excess of $5,000. *Id.*

As to Cobb's economic expert, Mr. Shapiro, Defendant raised serious questions concerning his accounting testimony and the assumptions on which he based his estimates of economic damages. Cobb's actual earnings history did not support some of Shapiro's projections and some of his other conclusions were based upon assumptions challenged by the Defendant. Shapiro's general assumptions included the following: (1) although Cobb had not fought for years, he was still an attractive ticket draw because of his past reputation as a tough fighter and a never quit fighting style; (2) Cobb was a media draw because he was a well-known public figure because of his fighting style; (3) if Cobb continued his successful comeback, he would be an attractive fight opponent for a top contender or champion because he was popular, but beatable; (4) despite a history of drug use and boxing-related injuries, Cobb would turn his athletic career around at the age of thirty-eight for a last title shot; (5) Cobb would continue to enjoy success as a professional boxer for seven years; and (6) Cobb would maximize his potential as an actor and entertainer, working steadily and at high rates of pay until he reached the age of sixty. In addition to questioning the validity of these assumptions, Defendant also contends there is relatively little proof of emotional or psychological damage to Cobb and, therefore, there is no basis for a substantial damages award for such damages.

Certainly there is conflicting evidence as to the amount of damage sustained by the Plaintiff as a result of the libelous article, and it is true the jury could have reached a lesser amount of damages. Credibility of the witnesses was a central

factor throughout the trial. The fact is, however, that the jury chose to believe Cobb and his witnesses rather than the witnesses of the Defendant. Whether the jury is more persuaded by one party's proof than the other party's proof, however, is not the test for a remittitur. The question before the Court is whether the jury's verdict exceeded the reasonable *maximum* amount of an award of damages. Having thoroughly reviewed the record and considered all the relevant evidence concerning Plaintiff's compensatory damages and the contrary contentions of the Defendant, the Court finds that the proof is sufficient to support an award of pecuniary and nonpecuniary damages totaling $ 8.5 million. As such, the compensatory damages award did not exceed the reasonable maximum, and there is no basis for remittitur under Rule 50 or 59.

With regard to the punitive damages, the Court finds there was ample evidence for the jury to find by clear and convincing evidence that the Defendant acted recklessly, fraudulently, or intentionally. The employees of the Defendant who were most knowledgeable about Barch and his lack of credibility, and who were most directly responsible for writing the article admitted that the article was very derogatory and could destroy a person's career. There also was evidence that it was known prior to publication that the article contained false and misleading information which put Cobb in a negative light.

Defendant also submits the $2.2 million punitive damages award should be remitted. As discussed above, this figure approximates SI's profits on only a single issue of its magazine. Having reviewed this amount in light of the factors

announced in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), the Court finds this amount appropriate and reasonable. As such, no remittitur is warranted under the Federal Rules.

## IV. CONCLUSION

For the reasons discussed herein, Plaintiff's Motion is GRANTED IN PART and DENIED IN PART. In particular, the Motion is GRANTED insofar as it seeks an award of post-judgment interest pursuant to 28 U.S.C. 1961 and DENIED insofar as it seeks pre-judgment interest pursuant to Tenn. Code Ann. § 47-14-123. Defendant's Motions for judgment as a matter of law or, in the alternative, for a new trial or remittitur, are DENIED.

/s/ _____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

**No. 3:94-0836**

**[Filed January 11, 2000]**

| | |
|---|---|
| RANDALL CRAIG COBB, a/k/a RANDALL "TEX" COBB, | ) |
| Plaintiff, | ) |
| v. | ) |
| TIME, INC., d/b/a SPORTS ILLUSTRATED, | ) |
| Defendant. | ) |

**ORDER**

For the reasons discussed in the Memorandum contemporaneously entered herewith, the Court rules as follows:

(1) Randall Craig Cobb's Motion to Amend Judgment (Docket Entry No. 320) is hereby GRANTED IN PART and DENIED IN PART. In particular, the Motion is GRANTED

insofar as it seeks an award of post-judgment interest pursuant to 28 U.S.C. 1961 and DENIED insofar as it seeks pre-judgment interest pursuant to Tenn. Code Ann. § 47-14-123.

(2) Defendant's Renewed Motion for Judgment as a Matter of Law or in the Alternative for a New Trial or Remittitur (Docket Entry No. 319) is hereby DENIED.

(3) Defendant's Renewed Motion for Judgment as a Matter of Law or in the Alternative for a New Trial or Remittitur on the Issue of Punitive Damages (Docket Entry No. 359) is hereby DENIED.

It is so ORDERED.

/s/ _____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

**No. 00-6190**

**[Filed May 1, 2002]**

| | |
|---|---|
| RANDALL CRAIG COBB, a/k/a RANDALL "TEX" COBB, | ) |
| Plaintiff-Appellee, | ) |
| v. | ) |
| TIME, INC., d/b/a SPORTS ILLUSTRATED, et al. | ) |
| Defendants, | ) |
| Sharon Ruben Cobb, | ) |
| Appellant. | ) |

On Appeal from the United States District Court
for the Middle District of Tennessee

Before: KENNEDY, MOORE, and COLE, Circuit Judges.

## OPINION

KENNEDY, Circuit Judge. The plaintiff in the underlying libel suit, Randall "Tex" Cobb, won a jury verdict in the amount of $10.7 million. Final judgment was entered by the district court in Cobb's favor on September 8, 1999. On June 12, 2000. Sharon Cobb, Randall's ex-wife, filed a motion to intervene under Federal Rule of Civil Procedure 24, seeking to protect her interest in the judgment. She had obtained a lien against the proceeds of any judgment in the *Cobb v. Time* suit in divorce proceedings in Tennessee state court. In addition to her motion to intervene, she filed a motion to declare the judgment lien of the Tennessee court entitled to full faith and credit. In an order dated August 1, 2000, the district court denied both motions. Sharon Cobb appeals.

On January 30, 2002, this court reversed the district court's judgment in the underlying libel case, *Cobb v. Time, Inc.*. No. 00-5159, and remanded for entry of judgment in favor of defendant. Because Sharon Cobb's interest in the judgment award is no longer an issue, we dismiss this appeal as moot.

## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 00-6096/6301**

**[Filed May 1, 2002]**

RANDALL CRAIG COBB, a/k/a RANDALL "TEX" COBB, Plaintiff-Appellee-Cross-Appellant,

Bochetto & Lentz, Attorneys-Cross Appellants

v.

TIME, INC., d/b/a SPORTS ILLUSTRATED, Defendant-Appellee,

B. Ryland Wiggs and Ben Hall McFarlin, Attorneys-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee

Before: KENNEDY, MOORE, and COLE, Circuit Judges.

## OPINION

KENNEDY, Circuit Judge. The plaintiff in the underlying libel suit, Randall "Tex" Cobb won a jury verdict against the defendant, Time, Inc., in the amount of $10.7 million. Cobb was initially represented by attorneys Wiggs and McFarlin ("W&M"). W&M filed the complaint and drafted and filed a response to defendant's motion for summary judgment. Cobb later found attorneys Bochetto & Lentz, P.C. ("B&L"), who were better able to finance Cobb's case and more experienced. W&M filed a motion to withdraw, which was granted by the district court. B&L proceeded to try the case on Cobb's behalf, obtaining the $10.7 million judgment. W&M then moved the district court to declare and enforce an attorneys' lien on 10% of the proceeds of the litigation. Subsequently, W&M moved to amend the request to one-third of the proceeds. The district court granted W&M's motion to the extent of $1400 in litigation costs advanced and 10% of B&L's 40% contingency fee. W&M appeal the order, and B&L cross-appeal.

On January 30, 2002, this court reversed the district court's judgment in the underlying libel case, *Cobb v. Time, Inc.*, No. 00-5159, and remanded for entry of judgment in favor of defendant. Because the proper allocation of attorney's fees from the recovery is no longer an issue, we dismiss this appeal as moot.

No. 02-3

(2)

Supreme Court, U.S.
FILED
JUL 26 2002
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

RANDALL "TEX" COBB,

*Petitioner,*

—v.—

TIME, INC.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Court of Appeals properly conduct an independent review of the record in a public figure libel case when it determined, based on undisputed facts, that there was no evidence of actual malice?

## LIST OF PARTIES BELOW

All parties appear in the caption of the case on the cover page.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states as follows: Time Inc., a Delaware company, is indirectly wholly owned by AOL Time Warner Inc. AOL Time Warner Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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### TREATISES

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Respondent respectfully submits that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 30, 2002 should be denied because no question worthy of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

## COUNTERSTATEMENT OF THE CASE

### Proceedings Below

This action for defamation was commenced on September 21, 1994 by Randall "Tex" Cobb, a former professional boxer and sometime character actor, who was suspended indefinitely from boxing by the Florida State Athletic Commission ("FSAC") for failing a drug test conducted shortly after he participated in a fixed fight. Cobb sued *SPORTS ILLUSTRATED* magazine ("*SI*") regarding its publication of an article entitled "The Fix Was In," which dealt with the activities of Rick Parker, a Florida promoter who was responsible for fixing a number of bouts (the "Article"). On September 15, 1992, Cobb participated in one of those fixed bouts. The Article contained detailed allegations by Cobb's opponent in that fight, Sonny Barch, about Cobb's knowing involvement in the fixed fight and his use of drugs after the fight. (App. 1722)[1]

Prior to trial, the district court held that there was no evidence of actual malice on *SI*'s part in reporting that the Cobb-Barch bout had been fixed. Barch, the court stated, told that to *SI*, so testified before the FSAC and "other sources, such as Don Hazelton (FSAC's Execu-

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[1] Citations in the form App. __ are to the Joint Appendix filed below. Citations in the form of Pet. __ are to the Petition for Writ of Certiorari. Citations to Pet. App. __ are to the Appendices annexed to the Petition for Writ of Certiorari.

tive Director) corroborated that the fight was fixed." (App. 398) Accordingly, partial summary judgment was granted to *SI* on this issue. That the fight was fixed was not an issue at trial and is not at issue now. (*See* Pet. 5; fact "that the fight was fixed" was "undisputed")

The district court also held that the Article's implication that Cobb had been suspended after testing positive for cocaine after the fixed fight was substantially true. Cobb conceded that he was suspended because his post-fight drug test indicated marijuana use. In granting *SI*'s motion for summary judgment on this issue, the court concluded that the truthful "sting" of the Article was that "a professional boxer ingested an illegal drug prior to fighting and that such drug would likely affect his ability to box." (App. 408)

Nonetheless, the district court permitted the jury to consider Cobb's claim based on two closely related statements: (1) that Cobb "knowingly" participated in the fixed fight; and (2) that Cobb shared cocaine *after* the fight. (App. 1558) At trial, the jury heard uncontradicted evidence that in addition to Barch's account, *SI*'s journalists obtained and relied upon a great deal of evidence corroborating Barch's account of the events—most significantly, that Hazelton, the Executive Director of the FSAC and an eyewitness to the Cobb-Barch bout who had investigated the bout for the FSAC, told *SI* that the fight had been fixed and that he credited Barch's assertions that Cobb had knowingly participated in the fixed fight and had used cocaine after the fight. (App. 1527, 1530, 1539-40, 1547) The *SI* journalists also repeatedly viewed the tape of the fight and reached their own conclusion that Barch's story was credible. (App. 956, 978, 1067, 1113-14, 1289-90, 1353, 1642-43, 1647)

At the close of the trial, the jury returned a verdict in Cobb's favor in the amount of $8.5 million in compen-

satory damages and $2.2 million in punitive damages. (App. 503-506)

On September 8, 1999, the district court entered judgment affirming the award of punitive damages against *SI*. (App. 191) On July 8, 1999, *SI* filed its motion for judgment as a matter of law or in the alternative for a new trial or remittitur. (App. 520) The district court denied the motion on January 11, 2000. (Pet. App. 23a)

On *SI*'s appeal, the Sixth Circuit, after conducting an independent review of the record focused narrowly on the undisputed facts relevant to the two alleged defamatory statements at issue, unanimously held that the record did not support a finding of actual malice. The Court of Appeals accordingly reversed the district court's order and judgment and remanded for entry of judgment in favor of *SI*. (Pet. App. 3a) The full panel of the Sixth Circuit denied Cobb's Petition for a rehearing, with no judge voting to grant the application. (Pet. App. 1a)

## Facts

The undisputed facts, presented at trial through the uncontroverted testimony of witnesses and *SI*'s contemporaneous interview notes, tapes and memoranda,[2] showed the following:

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[2] *SI* reporter Sonia Steptoe took notes at every interview and tape recorded many significant interviews, including those of Sonny Barch, Rob Russen, and Rick Parker. (App. 964, 992, 1017, 1071-72; vol. 7) Steptoe's notes of her interviews of Don Hazelton, Russen, Barch, Parker, and Cobb, and *SI* senior editor Steve Robinson's notes of conversations with Barch, Hazelton, *SI* investigator Marty Dardis, and *SI* Memphis stringer David Lyons, fully confirmed Steptoe and Robinson's testimony as to what they learned. (App. 972, 974-75, 1018-19, 1035, 1065; 1632, 1636; 1734-35, 1807-08, 1858-59, 1912, 1943-34, 2365-70) Steptoe also prepared memoranda concerning her

In mid-September 1993, *SI* senior editor Steve Robinson received a telephone call from Sonny Barch, who identified himself as a participant in a fixed fight promoted by Rick Parker in Fort Lauderdale, Florida in 1992. Barch told Robinson that Cobb had been his opponent in that fight and that Barch had also managed a boxer who participated in another Parker-promoted fixed fight. Barch told Robinson that he had given sworn testimony on these matters to Don Hazelton, the Executive Director of the FSAC. (App. 1614-15)

Robinson's first step in checking out Barch's account was to call Hazelton. (App. 1621) Hazelton's boxing credentials were impeccable: he had been the Director of the FSAC for almost five years when the Cobb-Barch fight occurred; he had attended the Cobb-Barch bout itself as well as every other boxing match in Florida during his tenure at the FSAC; he had conducted an investigation of the Cobb-Barch fight for the FSAC; and he previously served as the president of both the National Association of Boxing Commissions and the North American Boxing Union, as well as the Executive Director of the International Boxing Organization. (App. 1516-20, 1530)

Hazelton confirmed to Robinson that Barch had given sworn testimony to the FSAC supporting his allegations that there were "improprieties as far as that fight was concerned" and that in Hazelton's opinion, "the [Cobb-Barch] fight had been an arranged affair." (App. 1546)

After speaking with Hazelton, Robinson contacted Marty Dardis, an *SI* investigator who had had a long career in law enforcement in Florida. Dardis, who retired

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interviews on a nearly daily basis, and transmitted them electronically to Robinson and *SI* writer William Nack, who reviewed them as they came in. (App. 1035, 1248, 1626, 1629, 1800-01, 1847-48, 1854-56, 1920-21, 1945-46, 1966-67)

as chief investigator for Janet Reno prior to her appointment as Attorney General, knew Hazelton and confirmed his reliability. (App. 1624-25)

After speaking with Hazelton and Dardis, Robinson assigned Sonja Steptoe—who had more than eight years of experience reporting for *The Wall Street Journal* and *SI*—to investigate Barch's allegations. (App. 963, 965, 1625) Steptoe immediately flew to Tallahassee and interviewed Hazelton for two and a half to three hours that night and all the following day. Hazelton told Steptoe that Parker was a boxing promoter with a reputation for corrupt practices, and that certain fights that Parker had promoted in Fort Lauderdale in September 1992 had been fixed. (App. 970-77, 1548-50, 1801)

Hazelton told Steptoe that when he arrived at the weigh-in for the September 15, 1992 fights, Parker sought to substitute Barch for Tim Anderson, who had been scheduled to fight Cobb. Parker told Hazelton that "he would rather have Barch in there because he couldn't trust Anderson." Parker complained to Hazelton that Anderson wanted $5,000 for the fight, which Parker said he could not afford. Hazelton knew, however, that Barch had not fought in years and that he was not "in very good condition." Moreover, Anderson told Hazelton that he would fight Cobb for $2,500 or less. (App. 1521-24)

On the night of the fight, Hazelton saw Cobb arrive "very, very late"—only about twenty minutes before the fights were scheduled to begin. Barch, in turn, appeared "bone dry" when he arrived in the ring, a sign that he had not even bothered to warm up. Hazelton noted his further surprise that Barch did not even have anyone in his corner. (App. 1526, 1528)

Hazelton played a videotape of the fight for Steptoe. Barch's performance, he told her, was "one of the worst I have seen." Cobb, in his first "comeback" fight after a

four-and-a-half-year layoff—a televised fight—"lacked enthusiasm for the fight." Hazelton told Steptoe that "some arrangement had been made and that [Barch] was just in there to kneel down a few times and get out." Hazelton also told Steptoe that the other officials who were sitting at ringside for the Cobb-Barch fight had also concluded that it was an "arranged" or fixed fight. (App. 977, 1009, 1529-32, 1609-10)

Because the fight appeared so suspicious, Hazelton ordered both Cobb and Barch to undergo a surprise drug test immediately after its conclusion. Barch tested positive for cocaine, Cobb for marijuana. Hazelton imposed an indefinite suspension on both fighters. (App. 980-81, 1533-36, 1798-99)

Hazelton told Steptoe that he was contacted by Barch in the summer of 1993. Barch told Hazelton that Parker had induced him to "take a dive" in the Cobb fight, and that Cobb had come to his hotel room before the fight to discuss how Barch would do so in the first round. Hazelton described Barch telling him that he and Cobb had used cocaine after the fight in Parker's hotel room. Hazelton told Steptoe that Barch had later repeated these allegations in a sworn statement to the FSAC. (App. 1537-40)

Hazelton believed Barch. He told Steptoe that he "thought that the information [he] received from Barch was accurate," and that the tape of the fight "bears out everything" that Barch said. (App. 1541, 1547, 1556) Steptoe found Hazelton to be a "very credible" witness, with an "encyclopedic knowledge" of boxing. (App. 989)

Steptoe then interviewed Rob Russen, who had been Rick Parker's partner in the September 1992 Fort Lauderdale promotion and in other promotions during the preceding eight years. Russen told Steptoe that "everyone in

the know at the promotion" knew that Barch was "going in to take a dive." (App. 995-96)

Steptoe then spoke by telephone with Anderson for approximately an hour and a half. Anderson confirmed that Parker had substituted Barch for him as Cobb's opponent at the weigh-in. Anderson also told Steptoe that, while Parker had told people that the substitution was driven by Anderson's financial demands, the real reason was that "Sonny Barch was going to lay down for Tex Cobb in the first round." (App. 1004-05, 1856)

Finally, Steptoe and *SI* reporter William Nack, who had been a journalist for thirty years, interviewed Barch at his home in Arkansas. Steptoe and Nack spent two and a half to three hours with Barch on the evening of their arrival and interviewed him for several hours at his home during the next day. (App. 1011, 1016, 1274-78, 1627-28, 1921). Barch told them the same story he had told Robinson over the phone, providing more details about the fixed fight and Cobb's participation therein. (App. 1011-1014, 1020-34, 1277-84)

From the start, the *SI* journalists were well aware of the need for caution in evaluating Barch's allegations. He had admitted that he had thrown a fight and repeatedly abused drugs. He had asked for money from *SI*.[3] The record is plain that Barch's background caused the journalists to apply heightened scrutiny in evaluating his account and to take extra steps to investigate it. (App. 940, 1019-20, 1284-85, 1630-40)

Robinson, Nack and Steptoe repeatedly viewed the videotape of the Cobb-Barch bout and independently concluded that Cobb appeared to be fighting in a con-

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[3] *SI*'s payment to Barch is disclosed in the Article, and the magazine did not violate its own procedures in compensating Barch for his first-person account which accompanied the Article. (App. 1725; 932-38; 1616-17, 1678-79)

trived fashion. Robinson obtained the tape because he "wanted to make an independent assessment [of] what that fight looked like and whether that fight was in fact fixed." Robinson and Nack, both of whom had extensive experience in boxing,[4] as well as Steptoe and *SI* fact-checker Sally Guard, all concluded that Cobb's performance did not appear to be genuine. Steptoe testified that she thought that both boxers "looked like they were acting," that none of Cobb's punches had authority, and that most were not landing. It was "very clear" to Nack that this was a "rigged fight" in which Cobb was simply "trying to look good." Robinson noted that Cobb was "pulling his punches," and threw only glancing blows at Barch, even though Barch was doing little to protect himself. Robinson's viewing of the tape led him to believe that Barch had taken a dive and that Cobb "was part of it." Guard also concluded that the fight did not look legitimate. (App. 956, 978, 1067, 1113-14, 1289-90, 1353, 1642-43, 1647, vol. 6)

After interviewing Barch, Steptoe met with Parker at an Atlanta airport hotel. Parker denied most of Barch's allegations. Parker did corroborate Barch on one key point: he stated that he had replaced Anderson with Barch because Parker was not going to give Anderson the chance to "derail me" by beating Cobb. (App. 1077-78, 1962)

The record is undisputed that extensive efforts were made by *SI* to locate and to interview Cobb. Steptoe asked each person she interviewed whether he or she had Cobb's telephone number or knew how he could be contacted. She asked Parker to have Cobb contact her. She contacted Cobb's handler and left numerous messages

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[4] Robinson had seen "hundreds" of boxing matches and had served as *SI*'s boxing editor for nine years. Nack had seen dozens of fights and had covered boxing matches for various publications since 1972. (App. 1292, 1643)

for his Hollywood agent. She called Cobb's wife, sent two faxes to Cobb's home, and called a friend of Cobb and a magazine reporter who had interviewed Cobb on another matter. The faxes alerted Cobb that *SI* was working on a story that would contain allegations about the Cobb-Barch bout. (App. 1052-63, 1070-71, 1939-42)

Finally, on September 26, 1993, Cobb returned Steptoe's calls and messages. Cobb denied that he had participated in a fixed fight, and told Steptoe to watch the tape of the fight—statements that were set forth in the Article. Cobb declined Steptoe's request to fly to Nashville to meet him. (App. 1063-69, 1224) Cobb testified that he did not give Steptoe the name of anybody else she could talk to, nor did anyone on his behalf give Steptoe the names of anybody else she could talk to. (App. 1224-25)

At the end of the day, the *SI* journalists determined that the results of their research, interviews and review of the fight in question together supported the conclusion that Barch's account of Cobb's knowing participation in the fixed fight and post-fight use of drugs was credible. Cobb introduced no evidence at trial to dispute any evidence about *SI*'s activities, the investigative measures testified to by *SI* or the impact of such investigative findings upon the *SI* journalists' state of mind. It was upon this undisputed set of facts that the Court of Appeals properly determined that Cobb had failed to demonstrate that *SI* had acted with actual malice and that the judgment entered in Cobb's favor thus had to be reversed.

## REASONS FOR DENYING THE WRIT

### Summary of Argument

The single question presented for this Court's review does not reflect any conflict between this case and that decided by any other circuit. No such circuit conflict is even claimed. Nor is the Court of Appeals' decision inconsistent with that of any ruling of this Court. The sole issue considered by the Sixth Circuit, whether or not *SI* acted with actual malice, was decided correctly below on the basis of undisputed testimony and the Court's review of the record was entirely consistent with both the First and Seventh Amendments.

This is, in any event, hardly an appropriate case even to consider the issue sought to be raised by the Petition of a supposed "clash" between the First and Seventh Amendments. There is no ambiguity here that all the facts relevant to the issue of actual malice were undisputed and that it was thus unnecessary for the Court of Appeals to even reach the issue of deference to the jury's credibility determinations.

The Petition does *not* claim (as it cannot) that the Court of Appeals applied an incorrect standard of review or that its decision is inconsistent with this Court's decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989). What the Petition says, at most, is that the Court of Appeals failed to articulate its *methodology* for jury deference. In fact, the Court of Appeals clearly enumerated the "undisputed facts" upon which it based its conclusion that there was no evidence of actual malice. (Pet. App. 6a-13a; 21a) The Court of Appeals applied the correct standard of review and limited that review to the relevant undisputed facts of the case. There was no need for it to make additional findings—related to jury deference or otherwise—not relevant to the

actual malice determination, and there is no issue raised in this case that is worthy of this Court's review.

## I.

## The Court of Appeals' Decision Is Unworthy of Review by This Court Because It Is Not Inconsistent with That of Any Other Circuit or This Court, Is Clearly Correct and Is Entirely Consistent with Both the First and Seventh Amendments

### A. There Is No Conflict Within the Circuits Applicable to the Court of Appeals' Decision

The standard of review that was articulated and applied by the Court of Appeals with regard to the issue of actual malice—the only issue raised in the Petition—is consistent with that applied by other circuit courts and this Court. Read closely, the Petition does not claim otherwise.

The standard articulated by the Court of Appeals was as follows:

> "Credibility determinations made by the trier of fact are reviewed under a clearly erroneous standard, but the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " (Pet. App. 16a, citing *Harte-Hanks*, 491 U.S. at 688, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964))

Petitioner does not disagree—as he cannot—that the clearly erroneous standard is used when credibility determinations by a jury are at issue. *Harte-Hanks*, 491

U.S. at 688, citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Nor does —or can—Petitioner actually disagree with the Court of Appeals about the propriety of independent appellate review, a requirement embodied in cases ranging from *New York Times Co.*, 376 U.S. at 284-85 through *Harte-Hanks*, 491 U.S. at 688.

What, then, is the problem? The supposed vice of the ruling of the Court of Appeals, according to the single question presented for review, is that it "follow[ed] *no articulated method* for deferring to the jury's factual findings." (Pet. i, emphasis added) According to the Petition, the opinion "omitted the critical middle step, the step in which the rubber meets the road in appellate defamation practice" of "first identify[ing] and segregat[ing] those jury findings to which the 'clearly erroneous' standard applies." (Pet. 22) In effect, Petitioner complains that, although the Court of Appeals articulated the correct standard, it failed sufficiently to articulate in detail its "methodology" in applying that standard. (Pet. 3)

But this is the stuff of law school, not law. It is simply professorial grading of a judicial opinion with the student (the Court of Appeals, that is) failing the examination not for offering a "wrong" answer but for insufficiently fleshing out every possible premise of that answer. In real "appellate defamation practice," however, as in all appellate litigation, there is room for brevity as well as protracted analysis in judicial opinions. *See* Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 203 (1994) ("overwritten, needlessly encyclopedic opinions are no credit to a judge, a court, or the law, and most certainly of no help to lawyers").

There are, of course, cases in which it is useful for a court to specify at length all possible jury findings as to which one standard might apply as opposed to another. *See, e.g., Celle* v. *Filipino Reporter Enterprises Inc.*, 209

F.3d 163, 184 (2d Cir. 2000) ("This task [of independent review] is complicated in situations, such as the instant case, where the evidence turns in substantial measure on questions of credibility. . . ."). But this is hardly such a case. For this was the easiest of cases requiring reversal, one in which, as the court said, the critical facts were undisputed. *See, e.g.*, *Levan* v. *Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 n.27 (11th Cir. 1999) (concluding that there was no evidence of actual malice and noting that addressing the question of deference to facts found by the jury was unnecessary: "In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed. . . ."); *Eastwood* v. *National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) ("Here, however, enough key facts are undisputed that we can reach a conclusion without interviewing—or ignoring—the jury."); *Newton* v. *National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990) (concluding that the uncontroverted facts revealed no evidence of actual malice "regardless" of whether or not the jury believed the journalists' testimony about their state of mind).[5] It is

[5] In *Harte-Hanks*, the undisputed facts themselves showed evidence of actual malice and the Court took into account the jury's determination that the newspaper's explanations for its omissions were not credible to conclude the record as a whole supported a finding of actual malice. 491 U.S. at 691-92. But where, as here, the undisputed facts show no evidence of actual malice, a jury's finding that the defendant's testimony was not credible is not sufficient by itself to constitute clear and convincing evidence of actual malice. As this Court stated in *Bose*: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. In this case [the discredited testimony] does not rebut any inference of actual malice that the record otherwise supports, but it is equally clear that it does not constitute clear and convincing evidence of actual malice." *Bose*, 466 U.S. at 512; *see also Newton*, 930 F.2d at 671 (a determination of actual malice "cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial").

also one in which proof of actual malice was all but non-existent and in which such proof as was offered failed to meet *any* test that *any* court has prescribed.

In such circumstances, there is no basis for the writ to be granted.

### B. The Court of Appeals' Decision Was Based upon Its Review of Undisputed Facts Relevant to Actual Malice in a Manner Entirely Consistent with the First and Seventh Amendments

The Court of Appeals' review, far from being a free-roaming *de novo* review of the entire record (Pet. 11, 22), focused narrowly on the undisputed record facts relevant to the issue of actual malice. The Court of Appeals' opinion set forth clearly what the undisputed facts were that led the court to its decision without addressing more complex issues of no relevance to the resolution of so straightforward a case. It is no surprise that the ruling was unanimous and that not a single judge in the Circuit voted in favor of rehearing *en banc*.

The Court of Appeals began its analysis of the record by identifying the two alleged defamatory statements at issue, (1) "that Randall 'Tex' Cobb was a knowing participant in the fixing of his September, 1992 boxing match with Sonny Barch, and (2) that Cobb used cocaine with Barch after the boxing match." (Pet. App. 16a)[6] It then considered the facts underlying the grounds upon which Petitioner argued that he had demonstrated actual malice at trial, concluding that those facts were not even related to the *SI* journalists' belief in the accuracy of the two statements at issue.[7] (Pet. App. 16a-21a) It then

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[6] As Cobb's Petition raised no issue with respect to Cobb's drug use, we do not deal further with that subject.

[7] Petitioner asks that the Court impose "a rule that commands federal appellate courts, when reviewing a jury's finding of actual

turned to the "undisputed facts" in the record relevant to the question of actual malice and found that the conduct of *SI* was far from the kind of "purposeful avoidance of the truth" required by this Court's precedent, and that no inference of actual malice was warranted. (Pet. App. 21a-22a)

The Court of Appeals found that "the record in this case reveals undisputed facts which make it readily distinguishable from the *Harte-Hanks* and *Butts* [*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)] cases," (Pet. App. 21a), chiefly because the *SI* reporters relied upon Hazelton, an independent witness and boxing expert of great stature, who "provided powerful corroboration for Barch's story," and because the journalists reviewed and relied upon the videotape of the fight themselves, which "provided *SI* with further reason to believe Barch's story." (Pet. App. 21a)

The Court of Appeals rejected Petitioner's argument that *SI* had "serious reasons" to doubt Barch sufficient to warrant an inference of actual malice for relying on such a source. It found that the record showed that "*SI* was aware of Barch's sketchy past," but that "the *SI* reporters acted accordingly," and determined that "[t]he *SI* reporters uncovered no particular reason to think that Barch was lying" with respect to the two statements at issue. (Pet. App. 17a-18a)

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malice, to constrain reexamination of predicate facts to review under a 'clearly erroneous' standard." (Pet. 12) But as this Court has observed, a single bright-line rule as respects what "facts" are relevant to a determination of actual malice that would be applicable to all cases is not possible, for "only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards." *Harte-Hanks*, 491 U.S. at 686, citing *Bose*, 466 U.S. at 503. Here, Petitioner would have the reviewing court adopt facts that were not even related to the defamatory statements at issue as "predicate" to a finding of actual malice.

As for the Petition's assertion that "*SI* never corroborated the defamatory statement" (Pet. 4), the Court of Appeals correctly recognized that the allegations at issue were not subject to direct corroboration because they involved "one-to-one conversations (with no witnesses) between Barch and Cobb." (Pet. App. 17a) It credited *SI* for its "attempt[ ] to corroborate as much of Barch's story as possible." (Pet. App. 17a)[8]

A close reading of the Petition reveals that, with only an exception or two, Petitioner even now does not take the position that the Court of Appeals erred in maintaining that the undisputed facts set forth in the court's opinion, as opposed to the irrelevant facts addressed in the Petition, were undisputed—or, indeed, that since they were undisputed, the jury verdict and judgment based upon that verdict had to be reversed.

The Petition's complaints about *this* case (as opposed to the 20 pages of other rulings surveyed) are of two sorts. The first is that the court relied far too much upon

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[8] The Petition wrongly contends that *SI* "could have traced Cobb's whereabouts during the afternoon of the fight to determine if the meeting in Barch's room had really occurred," noting that Cobb's corner-man, Neely Owens, testified that he was in Cobb's presence the entire day and did not see Cobb go into Barch's room the afternoon of the fight. (Pet. 8 & n.7) In fact, *SI* could not have readily obtained such information. Cobb testified that he did not give Steptoe the name of anybody else she could talk to, including Owens, nor did anyone on his behalf give Steptoe the names of anybody else she could talk to. (App. 1224-25) Owens testified that neither Cobb nor *SI* knew how to get in touch with him prior to the day he testified. There was no evidence that *SI* had any knowledge that there was any witness with information that would have contradicted the consistent picture that emerged during the course of *SI*'s investigation and interviews. Under these circumstances, no inference of "purposeful avoidance of the truth" can be drawn. *See contra Harte-Hanks*, 491 U.S. at 692 (evidence showed defendant was aware of key witness but did not make any effort to interview her).

the "completely immaterial fact" that the fight was fixed." (Pet. 5) This is a truly extraordinary statement in an actual malice case, since if Barch, the source of the information about the fixed fight and Cobb's participation in it, was speaking truthfully about the fact that the fight was fixed, the *SI* reporters could surely give more credence to the rest of what he said, notwithstanding his checkered past that was fully disclosed in the Article itself. *See St. Amant* v. *Thompson*, 390 U.S. 727, 731-33 (1968) (no actual malice even though defendant did not verify information received from source of unknown credibility since there were other reasons to believe source); *McFarlane* v. *Sheridan Square Press, Inc.*, 91 F.3d 1501, 1513-14 (D.C. Cir. 1996) (no actual malice as to alleged defamatory statements despite dubious character of source because publisher had other reasons to believe the article).

More striking still is the Petition's rather casual effort to take issue with only a very few facts relied upon by the Court of Appeals. One was the testimony of Don Hazelton. As the opinion stated, Hazelton told Steptoe, *SI's* correspondent, that he believed Barch and that he "thought that the information [he] received from Barch was accurate." (App. 1547; Pet. 9a) There was no dispute about this. In his briefing in the Court of Appeals, as in his briefing here, Petitioner simply ignores Hazelton's testimony to that effect. Since Cobb had told Hazelton precisely what he had told the *SI* journalists—that the fight was fixed *and* that Cobb knowingly participated in the fix—Hazelton's conclusion, which he offered to the *SI* journalists, went far, in and of itself, to providing ample basis for their crediting Barch's story. The same is true of Hazelton's conclusion that the tape of the fight "bears out everything that was said" about the fight by Barch. (App. at 1556; Pet. App. 9a)

It is no answer to this to say that Hazelton did not "corroborate" what Barch told him. (Pet. 5-7) What Hazelton did was to offer to the *SI* journalists his independent, expert assessment that Barch, who had appeared before and spoken with Hazelton himself on multiple occasions in the latter's role as Executive Director of the FSAC and as the head of that commission's investigation of the fight, had told the truth to both of them. According to Hazelton, Barch told him about, *inter alia*, discussing with Cobb the details of the fixed fight prior to the fight itself. Hazelton provided that and other information to Steptoe. Hazelton told Steptoe, as well, "that the information I received from Barch was accurate."

Of course, Hazelton could not *know* that this was the fact. Barch's description of what had occurred related to meetings in which he and Cobb met alone. But no one was in a better position to offer an informed judgment on these issues than Hazelton. He was the Executive Director of the Florida State Athletic Commission for five years prior to the Cobb/Barch bout and an eyewitness to the fight who personally conducted an investigation of the fight for the FSAC, including lengthy interviews of Barch. *SI* interviewed Hazelton over two days and viewed the tape of the fight repeatedly with him as he commented.[9]

The only other factual issue adverted to in the Petition is Cobb's contention that the testimony of the *SI* jour-

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[9] As for Petitioner's assertion that *SI* failed to interview Cobb's physician, trainer, or "boxing experts" (Pet. 8), as the Court of Appeals noted, Hazelton was "undoubtedly a boxing expert," and that "[a]lthough *SI* did not interview the referee or ringside officials, Hazelton did tell *SI* that he spoke with the ringside officials who agreed that the outcome was pre-determined." (Pet. App. 21a) In any event, there was no evidence, and no indication to *SI* during the course of its reporting, that any of these witnesses would have provided any information that would have undermined Barch's credibility as to the two defamatory statements at issue.

nalists that one reason that they believed Barch was their analysis of the tape of the fight itself had been rejected by the jury after being "judicially contradicted." The jury viewed the fight tape itself, Cobb argues, and Cobb offered a boxing expert who opined that he had not knowingly participated in the fixed fight in which he was engaged. But this misses the point that is central to any actual malice assessment by an appellate court.

The question is not what the jury concluded as to truth; it is whether there was sufficient evidence for a jury to conclude that the *SI* journalists did not *believe* what they printed or printed it with serious doubts as to its truth. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280-81 (1964) (recognizing key question is whether the statement constitutes "what the defendant believes to be truthful information . . . although the principal matters contained in the article may be untrue in fact . . . ."); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."), *accord Harte-Hanks*, 491 U.S. at 688 (plaintiff must demonstrate that the defendant "actually had a high degree of awareness of . . . probable falsity"). There was no such evidence at all in this case.

The facts the Court of Appeals relied upon were undisputed. There are memoranda, notes and tapes of interviews in evidence which reflect, without contradiction, precisely what the reporters did and what they learned from each of their sources. The *SI* journalists' testimony as to the information they received, the beliefs they formed and the actions they took was uncontradicted. There was simply no need for the Court of Appeals to engage in review of additional facts which may have been disputed before the jury or to second-guess the

jury's credibility determinations on matters unrelated to the *SI* journalists' undisputed state of mind.

The Court of Appeals' review of the undisputed facts demonstrating *SI*'s good faith belief in the statements in the Article thus was perfectly consistent with the Seventh Amendment's required deference to the determinations of the jury. Any tension the Petition describes between the First and Seventh Amendments as a matter of abstract legal analysis simply is of no moment in this particular case. In these circumstances, there is no basis for the Court to grant plenary review.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
July 29, 2002

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(3)

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No. 02-3

# In the Supreme Court of the United States

Randall "Tex" Cobb,

*Petitioner*,

v.

Time, Inc.,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## I. Introduction

Respondent SI[1] evades both essential facts and the law in an effort to belittle the significance of this case and the question it presents. It is untrue that the Sixth Circuit and SI rely only on "undisputed" facts, thereby rendering deference to the jury a superfluous step of appellate analysis. The nature and meaning of Hazelton's testimony, of the isolated phrases SI lifts from context, are clearly disputed. Similarly, whether the journalists' concluded from a review of the tape that Cobb participated in the fix -- or whether they even so testified -- is disputed.[2]

The Sixth Circuit decided an important federal question contrary to *Bose v. Consumers Union*, 466 U.S. 485 (1984) and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), exemplifying a deeper conflict between independent review as commonly practiced and the Seventh Amendment as interpreted in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Like most courts conducting an independent review of a jury's actual malice finding, it failed to defer to the jury in any way whatsoever. The mass of evidence -- both case law and commentary -- confirms that the *Harte-Hanks* deference standard has spawned wholesale confusion. As a result, appellate rulings consistently run afoul of the Reexamination Clause. SI's tact of ignoring Petitioner's "20 pages of other

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[1] Cobb continues to use the abbreviations used in his Petition. Additionally, "Opp." refers to Respondent's Brief in Opposition and "Pet." to the Petition.

[2] Furthermore, many of the facts in the Opposition, such as the telephone exchange between Cobb and Steptoe, are also disputed.

rulings surveyed" (Opp. at 16) hardly eliminates this phenomenon.

## II. SI Mischaracterizes The Underlying Facts In An Effort To Dodge The Question Presented.

The Sixth Circuit Opinion never stated that it was relying only on undisputed facts and that a principled application of the *Harte-Hanks* standard of deference was therefore unnecessary. These *ex post* conclusions represent SI's effort to shore up an opinion that omits a step mandated by the Seventh Amendment and *Gasperini* as well as by the First Amendment jurisprudence of *Bose* and *Harte-Hanks*.[3]

The key facts pertinent to this Petition are, and were, disputed and Constitutionally reserved for jury determination. Hazelton did not, in reality, corroborate Cobb's participation in a fix, and SI so admitted at trial. Pet. n. 5 at 5-7. Indeed, that SI admitted before the jury that Hazelton did not, and could not, corroborate the falsehood that Cobb participated in the fix is undisputed. *Id.* Nevertheless, the Sixth Circuit rested its opinion on the idea of Hazelton's corroboration. It offered this oddly qualified conclusion: "While not stating, in so many words, that Cobb was knowingly participating in the fix, Hazelton provided powerful corroboration of Barch's story." Pet. App. at 21a. This statement typifies the unprincipled overreaching of the Sixth Circuit and most courts conducting an independent review -- the deliberate

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[3] What the Sixth Circuit did contend -- incorrectly -- is that undisputed facts distinguish the case from *Harte-Hanks* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Pet. App. at 21a

disregard of testimony before the jury and the court's rationalization of a conclusion contrary to the jury's. SI fails to rescue the idea of Hazelton's "corroboration" by its semantic adjustment -- its revelation that Hazelton was *really* providing an "expert assessment" that Barch "had told the truth" to Hazelton and Steptoe. Opp. at 18. Whether it is the word "story" or "truth" that is expected to encompass the unconfirmed defamatory statement that Cobb participated in the fix, the fallacy remains. The conclusion that Hazelton corroborated some determinative or influential piece of the defamation is precluded by the broader, pertinent admission that he did not corroborate that Cobb was part of the fix. No amount of equivocation, whether one plays with "story" or "truth" or some new tag, can reverse the legal impact of the admission. As a matter of law, the Sixth Circuit was obligated to conclude, as the jury must have found, that Hazelton did not provide SI with corroboration of the falsehood.[4]

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[4] The notion that confirming that the fight was fixed confirms Cobb's participation in fight fixing hardly merits consideration. The one proposition, quite simply, does not confirm the other. To conclude otherwise begs the question central to the trial. Both the District Court and jury were fully conscious of the premise underlying the trial that the assertion that the fight was fixed is not the equivalent of the defamatory statement that Cobb committed the crime of fight fixing. To assume an equivalence, as the Sixth Circuit and SI now tend to do, itself smacks of a reckless disregard for truth; it is the same sort of thoughtless leap that justifies a $10.7 million judgment.

Perhaps more importantly, SI admitted to the jury that corroboration that the fight was fixed does not serve to corroborate the false, defamatory statement. Pet. n. 5 at 5-7. As a matter of law, then, the Sixth Circuit was barred from finding otherwise and

SI continues to impose non-existent meanings on Hazelton's testimony by lifting isolated phrases from the transcript and placing them in an entirely different, self-serving context, the same error the Sixth Circuit copied from SI's briefs below. Cobb already noted that Hazelton's statement that the fight film "bears out everything that was said" did not, in context, implicate *Cobb*. Pet. n. 6 at 7; App. at 1555-1556. In fact, the focus of this testimony was *Barch* throwing the match. *Id.* Yet SI, like the Sixth Circuit, continues to burden the phrase with unintended meaning. Opp. at 6,17.

The phrase that Hazelton "thought the information received from Barch was accurate," which SI repeatedly cites and the Sixth Circuit echoed, is no different. *Id.* When Hazelton used the phrase in testimony, he was speaking very generally about the undisputed fact that the fight was fixed. He said: "*I thought the fight was arranged and* I thought that the information I received from Barch was accurate." App. at 1546-1547 [emphasis supplied]. Even the larger context surrounding that sentence included *nothing* about the idea of Cobb's participation, which SI's trial counsel was free to explore at any time. *Id.* Principled deference to a jury is needed to prevent just such falsifying manipulations of a cold, paper record.

But more significantly perhaps, to the extent there *is* a contradiction between SI's trial admissions that Hazelton did not provide corroboration and the meanings SI now hopes to tease from snippets of the record, the jury must have believed the admissions. And, again, the Sixth Circuit was obligated to defer to the jury's belief.

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SI's arguments to this Court to that effect are vain.

The outcome of the journalists' review of the tape is also disputed. The jury must have concluded that the journalists' review did nothing to confirm their false preconception that Cobb participated in the fix. Pet. at 7-8. First, the reporters' own *ex post* testimony falls short of establishing that the tape offered them confirmation. Steptoe said that she merely "wondered if" Cobb was "putting 100 percent effort" into the fight but did not reach a contrary conclusion. App. at 956. Indeed, she noticed that Cobb was throwing truly committed punches. *Id.* She later said it looked like the fighters "were acting" but this was "not a firm conclusion." App. at 978. Nack simply said that Barch "went in the tank." App. at 1290. Guard said the tape "jibed." App. at 1353.

But even if the testimony were as SI represents, the jury simultaneously both watched the tape and heard the journalists' testimony, observing their demeanor. Pet. at 7-8. The jurors also viewed the tape themselves and heard Cobb's expert testify that the tape did not show that Cobb participated in a fix. *Id.* Based on this, the jury must have rejected that the journalists could have drawn from the tape the confirmation SI now advances. Contrary to SI, there is no confusion here between falsity and state of mind. The jury, at most, made a typical credibility determination.

Such facts bearing on corroboration are significant because SI purposefully avoided the truth. Not one reporter dared ask the only question pertinent to the defamatory statement -- whether Cobb fixed the fight. Such facts are also important because SI relied solely on an unreliable source whom it had serious reasons to doubt. Both failings establish

actual malice.[5] *Butts*; *Harte-Hanks*; *St. Amant v. Thompson*, 390 U.S. 727 (1960).

## III. The Question Presented Requires Review.

The question demands review because the present standard, applied by courts conducting an independent appellate review, is deeply flawed and mired in disarray. As a result, most courts, like the Sixth Circuit here, abandon any standard of deference -- even if they acknowledge the existence of a general principle -- and engage in a wholesale redetermination of the facts. Decisions, like the Sixth

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[5] There are many other disputed facts that SI declares are undipsuted. For example, when Steptoe spoke to Cobb, she did not, in fact, offer to meet him in Nashville and did not even seek an interview. Trial Transcript 609. Indeed, Nack was already, at that moment, completing the final draft of the article, due for publication in less than 24 hours under SI's self-imposed ten-day deadline, even though it was not "hot news." App. at 1261-1262.

Perhaps even more importantly, Cobb would have had no reason to offer Steptoe the name of Neely Owens or anyone else who knew his whereabouts during the day when, according to Barch's false accusation, Cobb was supposedly conspiring with Barch on how to choreograph the fight. For Steptoe never confronted Cobb with the story about a conversation occurring in Barch's hotel room. App. at 1063-1064; Trial Transcript at 609. Surely, it is not the duty of an about-to-be defamed plaintiff, who lacks key information about the imminent defamation, to supervise professional journalists in avoiding purposeful avoidance.

The repeated idea that these experienced investigators could disprove the defamation only from their interviews with either Cobb or Barch is a pathetic rationalization for avoiding an adequate investigation. See Pet. at 8.

Circuit's, conflict not only with this Court's rulings in *Bose* and *Harte-Hanks* but with the Seventh Amendment and this Court's holding in *Gasperini*. As the Petition demonstrated with both the empirical evidence of court decisions and courts' and commentators' candid observations, the nation's appellate courts are at a loss on how to proceed with independent review. To disparage and then ignore this evidence and commentary refutes nothing.

SI's attempt to discount the question presented as a mere quarrel over "methodology" is a misleading play on words. Opp. at 12. At bottom, what SI dismisses as a conflict over empty terminology is nothing less than the serious conflict that moved this Court to accept review in *Harte-Hanks* in the first place, a conflict that *Harte-Hanks* not only failed to resolve but actually exacerbated. Certainly Justice Scalia and the other Justices of this Court who expressed approval of his views did not see the matter in such trivial terms. See Pet. 9-11, 23-26.

SI's predicate distinction between a "standard" and a "method" is false because a standard exists only through its application. Opp. at 12. Understanding *how* to defer to a jury is a precondition to deferring. The problem with independent appellate review, discussed in the Petition, is that the concept of deference, if appellate courts even mention it, is never activated.[6] Courts do nothing with it, and the law has reverted to a state more indefinite, ambiguous, and dangerous

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[6] Many courts perfunctorily acknowledge the idea but do not apply it. Some courts never mention deference. A few struggle with the application of a standard, but even these are split between a "reasonable jury"/ "may have" standard and something akin to a "must have" standard. Pet. at 15-20.

than what gave rise to this Court accepting certiorari in *Harte-Hanks*. The problem is not simply that the Sixth Circuit followed no *articulated* method but also that it followed *no* method.

The problem is indeed Constitutional and has nothing to do, as SI suggests, with an imagined risk of prolixity in judicial opinions. *Gasperini* explicitly provided that the final, minimum safeguard, the last protective bulwark, for the Reexamination Clause at the appellate level is a highly deferential standard of review. Moreover, the Reexamination Clause is aimed particularly at appellate review. For a court to note but not apply the clearly erroneous standard has become a mechanism for violating, not protecting, the Seventh Amendment. It is all too easy, and too common a practice, to refer in passing to the general idea of deference but then exceed the appellate function and invade the province of the jury.[7] Indeed, briefly reciting a general concept but not applying the principle has become a convenient means of disguising or excusing an avoidance of principle. Media defense attorneys know full well the status of the law:

> Appellate judges are divine people. If they become convinced that the speech you are defending is worthy of constitutional protection, they will have no trouble in exercising their divine right and intruding into

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[7] See Libel Defense Research Center statistics verifying the truly phenomenal percentage of actual malice reversals at Pet. at 20-21.

> the province of the jury under the guise of independent review.[8]

SI, completely ignoring the Seventh Amendment, hopes to perpetuate this imbalanced regime.[9]

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[8] Libel Defense Research Center, *Ten Years of Appellate Review in Defamation Cases from* Bose *to* Connaughton *to the Present*, LDRC Bulletin No. 2 (Apr. 1994) at 26.

[9] The facts of this case are ideal for correcting the appellate excess the above-quoted media defense lawyer smugly acknowledged. SI was completely successful before the Sixth Circuit in its effort to sully Cobb for having fought in a fixed fight. It is clear from the Opinion that the Sixth Circuit felt the speech was "worthy of constitutional protection," to borrow the quoted lawyer's phrase, because Cobb was caught in the middle of such a shoddy affair. Thus, the distinction between confirming that a fight was fixed and confirming that the victor committed the crime of fight fixing, central to the District Court proceeding and jury verdict, provides the opportunity to keenly illuminate how deference to the jury under the Seventh Amendment serves as a check on a reviewing court's undisciplined over-reaction to the facts.

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